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Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICHAEL C. WORSHAM,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Telecommunications Act of 1996, Section 704 preempted State and local control over wireless facilities such as cellular phone towers on the basis of the "environmental effects" of radio frequency emissions that comply with the Federal Communications Commission regulations concerning such emissions. Sections 601(c) expressly prohibited implied preemption. Section 253(b) preserves certain state regulation authority over public safety and welfare even if such regulation may create barriers to entry of telecommunications services.

1. Whether the Federal Communications Commission may imply federal preemption of local control and regulation over the "health effects" of radiation from wireless facilities, when the Telecommunications Act of 1996 expressly prohibits implied preemption, and only preempts local control over the undefined term "environmental effects."

PARTIES TO THE PROCEEDING

Petitioner in this Court is Michael C. Worsham, an attorney and resident of Maryland. Petitioner Worsham was a Petitioner in the Court of Appeals for the Second Circuit. He is a member of the Ad-Hoc Association of Parties Concerned About the Federal Communications Commission Radio Frequency Health and Safety Rules, an organization which was a Petitioner in the Second Circuit and a party to the FCC rulemaking. He has represented and is currently representing persons at zoning hearings for the siting of cellular towers. He has also represented himself at several cellular tower zoning hearings, and is currently appealing the approval of a cellular tower facility application in Harford County, Maryland. During this hearing he was restricted from discussing the health effects of the proposed cellular tower.

Other parties who participated in the proceeding in the court whose judgment is sought to be reviewed include: Cellular Phone Taskforce, Ad-Hoc Association of Parties Concerned About the Federal Communications Commission Radio Frequency Health and Safety Rules; David Fichtenberg; Citizens for Appropriate Placement of Telecommunications Facilities; John Bardis; Erica Zweig, Christopher Beaver, of Noe Valley Families Against the Antennas; Major Belkin; Donna Casey; Maggie Fox; Eileen Lahey; Mark R. Shirely; M. Sue Storm; Joseph Bohacz; Candice Brown; Gary Brown, of Families for Appropriate Cellular Tower Siting; Susan Clarke, of Environmental Health Advocacy League; Mary-Croughan Minihane; Libby Kelley; Silvia M. Siegel; Annegret C. Topel, of Citizens of Marin for Sensible Communications Planning; Jerry Davis; Jean Foley, of Ulysses Citizens for Responsible Technology; Holly A. Fournier, Selectboard member of Charlotte, VT and

co-chair of Citizens for Appropriate Placement of Telecommunications Facilities; Julianna Free, of Lifetime Resources, Inc.; Anne Galloway, of Hardwick Action Committee; David Gell; Richard Gianattiasio, of Northboro Residents for Responsible Tower Siting; Dale A. Newton; Janet R. Newton; Bernard Greenberg; Laridna A. Knowlton; Roger Knowlton, of Thistle Hill Neighborhood Alliance; Cathy Bergman-Venezia; Frank Goodrich; Andrew J. Hillman; Marija Huges; Mark Hutchins; Ralph E. Munston, of EMR Alliance; Julie E. Jordan, of Coalition of Concerned Citizens For Responsible Technologies; Jeannine Karlsson, Commissioner of Town of Bedford Conservation Board; Patricia Kelley; S.G. Lawrence; Emery Lazar; Dawn Mason; Dorothy Miller, Advisory Neighborhood Commissioner; Edward Steinman; Peter De Pippo; The Communications Workers of America, AFL-CIO; CWA Local 7810; Rainer Waldman Atkins; Alan Golden; Virginia J. Moore-Ward; Faye Mueller-Hebert; Patricia Vaughey; Bill Jenkins; and Council of Washington State CWA Locals.

Respondents in this case are the Federal Communications Commission and the United States of America, both of which were Respondents in the Court of Appeals for the Second Circuit.

Interveners in the Court of Appeals for the Second Circuit include the Cellular Telecommunications Industry Association, National Association of Broadcasters, Association For Maximum Service Television, Inc., Electromagnetic Energy Association, and AT&T Wireless Services, Inc.

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Petitioner respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in consolidated cases 97-4328(L), 98-4003(Con.), 98-4005(Con.), 98-4025(Con.), and 98-4122(Con.).

OPINIONS BELOW

A Petition is being filed in this case by several Petitioners represented by the firm of Landy & Seymour. That Petition contains what will be a joint Appendix in this case, which will be referred to as "A-". The voluminous FCC record in this rulemaking will be lodged with the Clerk of this Court. The FCC Orders will be referred to as FCC First Order at page #, etc. The original opinion of the Second Circuit Court of Appeals is reported as *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000) and is reproduced at A-1. The opinion of the United States Court of Appeals for the Second Circuit denying the petition for rehearing by the Cellular Phone Taskforce is reproduced at A-23. The opinion of the Second Circuit denying the petition for rehearing by Communications Workers of America is electronically reported at 2000 WL 862305 and reproduced herein at A-26. The Orders of the FCC are reported at 11 F.C.C. Rcd. 15123 (1996) and 12 F.C.C. Rcd. 13494 (1997), and also will be lodged with this Court by the firm of Landy & Seymour.

STATEMENT OF JURISDICTION

On February 18, 2000, the Court of Appeals affirmed the Orders of the FCC, and upheld the constitutionality of the 1996 Act and validity of the FCC's regulations. On June 6, 2000, the Court of Appeals denied the petition for

rehearing filed by the Cellular Phone Taskforce. On June 15, 2000, the Court of Appeals denied the petition for rehearing by the Communications Workers of America. The instant Petition is filed with 90 days of that decision, pursuant to Supreme Court Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Constitution Article I, § 1:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

15 U.S.C. § 2602(6):

> The term "health and safety study" means any study of any effect of a chemical substance or mixture on health or the environment or on both, including underlying data and epidemiological studies, studies of occupational exposure to a chemical substance or mixture, toxicological, clinical, and ecological studies of a chemical substance or mixture, and any test performed pursuant to this chapter.

42 U.S.C. § 2021(h):

> Consultative, advisory, and miscellaneous functions of Administrator of Environmental Protection Agency. The Administrator of the

Environmental Protection Agency shall consult qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the National Committee on Radiation Protection and Measurement, and qualified experts in the field of biology and medicine and in the field of health physics. The Special Assistant to the President for Science and Technology, or his designee, is authorized to attend meetings with, participate in the deliberations of, and to advise the Administrator. The Administrator shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States. The Administrator shall also perform such other functions as the President may assign to him by Executive order.

42 U.S.C. § 4332: *See* A-32.

42 U.S.C. § 7412(a)(7):

The term "adverse environmental effect" means any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

42 U.S.C. § 7412(b)(2):

> Revision of the list. The Administrator shall periodically review the list established by this subsection and publish thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) of this section as a result of emissions to the air. No air pollutant which is listed under section 7498(a) of this title may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is in a class of pollutants listed under such section. No substance, practice, process or activity regulated under subchapter VI of this chapter shall be subject to regulation under this section solely due to its adverse effects on the environment.

47 U.S.C. § 253(b):

> State regulatory authority
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 332(c)(7)(B)(iv) (Telecommunications Act of 1996, § 704):

> No state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

Telecommunications Act of 1996, § 601(c):

> Federal, State, and Local Law. — (1) No implied effect. — This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Additional statutory authorities are reproduced in the Appendix.

STATEMENT OF THE CASE

Petitioner, along with numerous other parties, participated in the judicial challenges to the Telecommunications Act of 1996 and the FCC regulations concerning the environmental and health effects of radio frequency emissions from cellular tower facilities. The challengers appealed the Second and final Order of the FCC to the Second Circuit Court of Appeals.

On August 1, 1996 the FCC released its Report and Order in ET Docket 93-62 ("First Order"), which set standards for human exposure to radio frequency radiation emitted from transmitters and facilities regulated by the FCC, including "personal wireless service facilities," commonly known as cellular towers. See Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 11 F.C.C. Rcd. 15123 (1996). The FCC rules precluded state or local governments from regulating the siting of wireless service facilities on the basis of environmental effects, including health effects, provided the facilities comply with the FCC's radiation emissions standards. First Order at paragraphs 164-168.

The Second Order, a final appealable Order, amended the FCC's rules and refined and clarified its decision in the First Order. *Second Memorandum Opinion and Order*, 12 F.C.C. Rcd. 13494 (1997) ("Second Order"). Petitioners challenged these substantive guidelines on a number of grounds. Petitioner's contentions included an assertion that this regulatory prohibition, as well as the statutory provision on which it is based (47 U.S.C. § 332(c)(7)(B)(iv)), is unconstitutional.

The Second Circuit rejected all of the petitioner's arguments and upheld the FCC's Second Order. Regarding the Act's preemption of "environmental effects," the Circuit panel simply assumed in the Background section of its opinion that "the Act preempted state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of health effects of RF radiation." A-5. In stating so, the Court effectively substituted the words "health effects" for the words "environmental effects," the words actually appearing in the Act. The Court of Appeals did include a discussion of whether the federal preemption extended to 'operation' of wireless facilities.

In two decisions dated June 6, 2000 and June 15, 2000, respectively, the Second Circuit denied rehearing of its decision. A-23 and A-26.

INTRODUCTION

Congress passed the Telecommunications Act of 1996 to encourage and expand new communications technologies, such as cellular telephones. In the Act Congress enacted a vague preemptive clause regarding "environmental effects," creating national confusion over an issue of paramount importance to local governments and communities: protecting the health of its citizens. The FCC subsequently exceeded its authority by interpreting this statute to preempt local consideration of the health effects of wireless facilities. Since every area of the United States is rapidly becoming blanketed by microwave radiation from wireless facilities, this case presents an important public health issue and a question of law that requires resolution by the Court.

This Petition challenges the reach of the FCC in interpreting and enforcing a preemption provision in the 1996 Act. Petitioner seeks review of the Second Circuit decision which upheld the Act and the FCC's regulations in all respects. Petitioner specifically challenges the decision's endorsement of the FCC's determination that the Act preempts local regulation of the adverse human health effects caused by microwave radiation emitted from wireless facilities. This Petition also seeks review of the conflicting opinions on preemption within the Second Circuit's own decisions, and among other Circuit and District Courts.

REASONS FOR GRANTING THE WRIT

Americans have expressed their great concern over the health effects from wireless radiation at numerous zoning appeals. *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 431 at n.6 (4th Cir. 1998) ("A few citizens did mention health concerns from radio emissions . . ."); *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732, 744-5 (C.D. Ill. 1997) ("Numerous objectors raised concerns about possible health effects of the proposed tower."); *Cellular Phone Company v. Town of Oyster Bay*, 166 F.3d 490 (1999) ("Of the comments, the vast majority were addressed to the perceived health threat that the sites might pose. Specifically, the residents of Oyster Bay expressed concern that the RF emitted by the cell sites might cause cancer. At the Glen Head hearing a petition was introduced into evidence bearing 640 signatures, all from residents opposed to the cell sites because of concern over potential health risks.").

This concern is understandable, since local authorities are the primary avenue through which citizens and communities address health issues. Unfortunately, the FCC's rule has effectively prohibited consideration of health effects during wireless facility siting. This has tied the hands of local decision makers, and left citizens frustrated. The FCC stated that it "has hesitated to intrude on the ability of states and localities to make regulations affecting health and safety." First Order at paragraph 166. However, the FCC clearly assumes it has the authority to preempt state and local regulation if it chose to, and clearly equates human health effects with the environmental effects preempted under the Act. *Id.* at paragraphs 164-168.

I. There Exists An Assumption Against Preemption In Areas Of Health

This Court has established the doctrine that federal preemption is not presumed, especially in matters of health and safety: "As a matter of statutory construction congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of statutory purpose. This is especially the case when public safety and health are concerned." *Mauer v. Hamilton*, 309 U.S. 598, 614 (1940). Relevant here is that the "regulation of health and safety matters is primarily and historically a matter of local concern." *Hillsborough County, Florida v. Automated Med. Lab., Inc.*, 471 U.S. 707, 719 (1985). When the ". . . the field that Congress is said to have pre-empted has been traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Hillsborough*, 471 U.S. at 716.

The Court of Appeals agreed with the FCC that local regulation of health effects was preempted by the Act. A-5. However, in addressing whether the "operation" of wireless facilities was preempted, the Court of Appeals reversed the burden of proof for preemption from the party seeking preemption to the party arguing against preemption. Instead of considering whether Congress had clearly *preempted* the traditional local control and police power over health and safety issues, as it should have, the Court considered whether the Act amounted "to clear congressional intent to *permit* state and local governments to regulate the operation of such facilities," A-21 (emphasis added). The Court of Appeals turned preemption analysis on its head, and improperly put the burden on the state or local entity to establish Congressional permission, rather than on the agency seeking preemption to establish clear Congressional preemption.

II. Contrasting Federal Court Decisions

The Court of Appeals' interpretation of 47 U.S.C. § 332(c)(7)(B)(iv) is arguably inconsistent with its own decision in *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2nd Cir. 2000). There the Court of Appeals discussed the term "health and safety" and recognized that the term "environmental effects" is not defined:

> This term is used in conjunction with the term "environmental effects," which is not defined in the statute but most likely refers to the already-existing requirement that the FCC prepare an Environmental Assessment in connection with the grant of a license. See 47 C.F.R. § 1.1307 (1998). The environmental effects specified by the regulations do not include RF interference, but rather focus on degradation of the natural

> environment, effects on historical landmarks, and the biological effects of RF radiation.

Id. at 325. This discussion leads to an important aspect of this issue: Did Congressional preemption of the "environmental effects" required for agency consideration in an Environmental Impact Statement (EIS) or Environmental Assessment (EA) extend to everything considered in that EIS or EA?

Section 704(b) of the 1996 Act directed the FCC to complete its Docket 93-62 action and prescribe "effective rules regarding the environmental effects of radio frequency emissions." The Court of Appeals held that the completed rulemaking action was the functional equivalent of an EIS. A-17. The net effect of this decision is to grant deference to a non-expert agency to preempt potentially any aspect of an EIS or EA, despite in the instant case, an express statutory prohibition on implied preemption. Section 601(c) of the 1996 Act.

At least one federal court has distinguished health effects from environmental effects. In *Iowa Wireless Services, L.P. v. City of Moline, Ill.*, 29 F. Supp. 2d 915 (C.D. Ill. 1998) the court stated that:

> While it is clear from the record that the City of Moline considered potential *health effects* of the tower, it is less clear that they considered *environmental effects*. In any event, Moline's position, which this Court finds correct, is that this statute prevents the denial of a permit on the sole basis that the facility would cause negative environmental effects. Here, even if it were to be concluded that the expressed "health concerns"

> fell within the meaning of "environmental effects," the decision which denied IW's application articulated other reasons besides that of environmental concerns.

Id. at 924 (emphasis in original).

Two federal courts have essentially agreed with the Court of Appeals in the instant case. The Fourth Circuit did not address the issue of preemption, but in a footnote simply assumed that environmental preemption extended to encompass health effects. *Virginia Beach*, 155 F.3d 423, 431 at n.6. A few citizens did mention health concerns from radio emissions, a concern the Act precludes. Similarly, in *Primeco Personal Communications v. Village of Fox Lake*, the court equated health and environmental effects without any discussion. 35 F. Supp. 2d 643 at 645 (N.D. Ill. 1999). (". . . local authorities may not deny cellular tower permits on the basis of perceived health risks").

This Court should resolve the confusion that has arisen in the federal courts, including that within the Second Circuit itself, over just what Congress preempted in the Act when it preempted local regulation of "environmental effects" of RF radiation, and whether such preemption was lawful.

III. Congress Has Distinguished Health Effects From Environmental Effects

Congress has previously distinguished adverse environmental effects from adverse human health effects disjunctively in at least two environmental statutes. The Toxic Substances Control Act defines the term "health and safety study" to mean

> any study of any effect of a chemical substance or mixture on health *or* the environment or on both, including underlying data and epidemiological studies, studies of occupational exposure to a chemical substance or mixture, toxicological, clinical, and ecological studies of a chemical substance or mixture, and any test performed pursuant to this chapter.

15 U.S.C. § 2602(6) (emphasis added).

The second and even clearer distinction is in the Clean Air Act (CAA), which provides that:

> The Administrator shall periodically review . . . pollutants which present, or may present, through inhalation or other routes of exposure, a threat of *adverse human health effects* (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or *adverse environmental effects* whether through ambient concentrations, bioaccumulation, deposition, or otherwise . . .

42 U.S.C. § 7412(b)(2) (emphasis added). The CAA also defines the term "adverse environmental effect" to mean "any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas." 42 U.S.C. § 7412(a)(7). This definition is the closest one available to the undefined term in the 1996 Act. This definition clearly does not include terms denoting human health effects. In light of these Congressional definitions there is simply no basis for the FCC to extend the 1996 Act's preemption of environmental effects to also encompass human health effects. The Court of Appeals deference to the FCC's interpretation was clearly wrong, even without the added force of the Act's prohibition against implied preemption.

IV. Nondelegation Doctrine

The Court of Appeals' decision violates the constitutionally based nondelegation doctrine, by granting the FCC excessive legislative discretion in the area of health and the environment.

In its Second Memorandum Opinion and Order, paragraph 111, the FCC admits that "The Commission does not have the expertise to make independent judgements on such alleged health effects as 'electrosensitivity' or other reported effects on human health. This is the responsibility of the federal health and safety agencies and other qualified public health organizations." A-51. The FCC recognizes that Congress gave the Environmental Protection Agency (EPA) the authority to provide guidance to all Federal agencies in forming radiation standards. 42 U.S.C. § 2021(h).

Regarding delegation, this Court has recognized that "If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 408 (1928) (citation omitted). Since the FCC is not such a board or commission, and the EPA is the authorized agency for developing radiation standards, we must presume Congress did not intend to give unconstitutional preemption authority to the FCC. We must conclude that local health regulation over RF emissions may not be preempted by the FCC under the jurisdiction of the challenged statute.

The Court of Appeals' decision allows the interpretation of federal statutes and promulgation of regulations by a federal agency that admits it has no expertise in the area it is interpreting. It also allows the FCC to determine the extent of federal preemption in the very area it has no expertise in. A-20, 21. The Court simply deferred to the FCC's "broad preemption authority under the Telecommunications Act," and did not address the expertise required of an agency for it to preempt local health regulations. A-20. This approach wrongly turns the federal preemption analysis into an automatic reliance on, and ratification of, an agency's predictable, if not mandatory, adoption of federal laws through standard agency rulemaking procedures.

Secondly, the FCC rulemaking violates the non-delegation doctrine because Congress did not provide an "intelligible principle" for the FCC to follow. *Mistretta v. United States*, 488 U.S. 361, 371-372 (1989) (citation omitted). Congress's delegation consisted of simply a reminder for the FCC to complete action in Docket 93-62. A-31. To rule that this pre-existing requirement to do an EIS

is proper delegation of an "intelligible principle" would allow Congress to delegate legislative power simply by reminding an agency to perform an EIS. Such a vague Congressional directive would not be permissible delegation even for an agency which has expertise in the delegated area. *American Trucking Ass'n, Inc. v EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999), *cert. granted*, __ U.S. __, 120 S. Ct. 3129, 147 L. Ed. 2d 231 (2000) (ruling that the construction of the CAA by the EPA — an expert agency in air pollution — effect an "unconstitutional delegation of legislative power").

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 00-0407, 00-0417, 00-0427

IN THE

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Federal Communications Commission and the United States of America, Respondents

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On Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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85pp

QUESTIONS PRESENTED

1. Whether comment on a matter that would lawfully require consideration when the lead agency in a rule making has expertise in the matter also requires such consideration when the lead agency does not have such expertise?

2. Whether the Federal Communications Commission ("FCC") lawfully reversed previous requirement that radio frequency (RF) radiation from its facilities be as low as reasonably achievable, considering 47 USC 324 requirements that radio stations use minimum power necessary for the desired communications?

3. Whether lead agencies not expert in a health or environment matter may follow procedures 'functionally equivalent' to the National Environmental Policy Act (NEPA) and so avoid their formal NEPA requirements, and whether FCC did so?

4. Whether an agency may have delegated authority to preempt state or local public health regulations on a matter when that agency does not have expertise in that matter, when expertise is otherwise lacking, or when the preemption delegation lacks a standard?

5. Whether FCC may imply "environmental effects" in 47 USC 332(c)(7)(B)(iv) includes "health effects", since PL 104-104 sec. 601 prohibits implied preemption and sec. 253(b) provides for States protecting public safety?

6. Whether Congress in 47 U.S.C. 332(c)(7)(B)(iv), by preempting local jurisdictions from regulating RF radiation, gave jurisdictions 'no choice' but to implement FCC rules, or to be compelled if they refused, has de facto commandeered states or local jurisdictions to run a federal program, in violation of the 10th amendment?

LIST OF PARTIES

List of Parties in proceeding below is given in the List of Parties section in each of the petitions 00-0393, 00-0407, 00-417, and 00-427.

Parties supported by this brief in support are David Fichtenberg (#00-0407), Michael C. Worsham (#00-0417), and Cellular Phone Taskforce ("CPT") (#00-0427).

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Opinions Below

In addition to reports in petitions supported, note that the Federal Communications Commission ("FCC") First Order in Notice 96-326 reported at 11 F.C.C. Rcd, 15123 (1996) established a 'transition' period. During this time previous FCC RF guidelines for station applications continued in effect [sec. 47 CFR 1.130(b)(4)]. 47 CFR 1.1307(b)(4)(i) continues in effect for certain services "Radio Frequency Protection Guides" recommended in the "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz" (ANSI C95.1-1982). For other services 47 CFR 1.1307 (b)(4)(ii) continues the RF guideline "IEEE C95.1-1991 (ANSI C95.1-1992) Safety Levels With Respect to Human Exposure To Radio Frequency Electromagnetic Fields 3 kHz to 300 GHz." These were lodged with the Court with petition #00-0407.

Jurisdiction

This brief is in support of certain petitions for writ of certiorari and is being filed pursuant to Rule 12.6 and Rule 24.2. It regards request of the judgment of the U.S. Court of Appeals for the Second Circuit in consolidated cases 97-4328 (L), 98-4003(Con.), 98-4005(Con.), and 98-4122(Con.). The original opinion is reported as *Cellular Phone Taskforce et al. v. FCC*, 205 F.3d 82 (2d Cir. 2000). The petitions supported are the petitions for certiorari of David Fichtenberg (Docket #00-0407), Michael C. Worsham (Docket # 00-0417) both docketed September 15, 2000, and in support of CPT (Docket #00-0427) docketed September 20, 2000. This brief is being filed on October 5, 2000 which is within the 20 day period

for filing provided by Rule 12.6.

This brief does not address support for the petition of Citizens For Appropriate Placement for Telecommunications Facilities et al. ("Citizens"), docket #00-0393, docketed September 13, 2000, because the date for formally expressing such support has past. I am an individually named party in the above named Court of Appeals case, with my name appearing on page 6 of the Court of Appeals docket report, and shall limit comments to additional points not in petitions already filed with the Court.

Certain affidavits, including those presented or referenced in the proceeding below are discussed further in Statement of the Case. Parties submitting these affidavits indicate how they are adversely affected by the challenged rulemaking. A favorable ruling by this Court would provide them significant relief.

Hearing Examiner documents at p.62-68 pertain to Mr. Fichtenberg's role as spokesperson for organizations in Seattle, Washington. 1996-present [see his petition at 11-15.]. Mr. Fichtenberg is President of Ad-Hoc Association of Parties Concerned About the FCC RF Health and Safety Rules (AHA), a party in the proceeding below. Its standing is discussed at p2-7 in the principal brief joined by all petitioners below, except CPT [see J.Hobson letter at 60]. Harms to AHA's mission impact Mr. Fichtenberg whose duties are to further it.

Constitutional and Statutory Provisions

In addition to the constitutional and statutory provisions already noted in the Petitions, 42 USC 1983 [p. 37], 47 USC 332(a) [p. 44] and (c)(3)(A) are relevant. [p. 44]

Statement of the Case

Reference to pages of the Joint Appendix in the proceeding below are designated by "JA". Reference to the briefs joined by all petitioners, except CPT, are designated as "Joint Petitioners or "JP".

Affidavits submitted and lodged with the Court:

A. During the proceedings below affidavits of the following parties in the Citizens petition were submitted or referenced (page nos. are of pages in copies of affidavits lodged with the Court:

CPT members Frank Goodrich of Texas (21), Marija Hughes of Washington D.C. (39) in exhibit of April 19, 1998 CPT motion for partial stay. Janet Newton (4), Dale Newton (5) Roger Knolton (6) and Lorinda Knolton (7) of Vermont, in April 29, 1998 Comments supporting motion for partial stay

B. Sixteen additional affidavits indicating they are members of CPT were submitted in a CPT April 19, 1998 motion for partial stay and include persons from the following States: Vivian Ferguson (18) and Eldfrid Bowron (20) of Washington; Muriel Anrow (28), Martha Winsten (30), Arthur Firstenberg (11), June Reiber (66) and Janet Ostrowski (90A) of New York; Charles Mainville (32) of Maine; Hal Rudnianin (34) and Alison Rall (37) of Michigan; Derek Bishop (35) of Hawaii; Alice Beougher (41) of Ohio; Lucinda Grant (54) and Susan Malloy (87) of Arizona; and Regina Siberski (68) and Kathleen P. Hawk (73) of Pennsylvania.

These show harms for which relief will be provided by a favorable ruling. See examples at p.57-8. The symp-

toms in many of these affidavits are similar to those EPA described (and was reported in the proceeding below.) EPA noted that complaints of symptoms attributed to RF exposure such as nausea, headaches, dizziness, pain in the eyes, ringing of ears, screeching and sizzling sounds, and irregular heartbeat are described collectively by the term "electrosensitivity." [JA 5538-39], JP Reply at 39. Also filed is affidavit of Michael C. Worsham, regarding its mention in JP principal brief of May 22,1998, and affidavit of D. Fichtenberg regarding its mention in JP Reply brief of July 27, 1998. His supplementary affidavit that I requested is at p.58.

Statement of case regarding Question #2:

Whether the Federal Communications Commission ("FCC") lawfully reversed previous requirement that radio frequency (RF) radiation from its facilities be as low as reasonably achievable, considering 47 USC 324 requirements that radio stations use minimum power necessary for the desired communications?

Keeping exposure as low as reasonably achievable is referenced in a petition for reconsideration to FCC of Ad-Hoc Association and other parties in the Joint Appendix ("JA") of the proceeding below at JA 0892 and in ex parte comments at JA 1359-62, at JP brief at 31. 47 USC 324 requires that radio stations shall use the minimum amount of power necessary to carry out the communications desired. (see text at David Fichtenberg (DF) petition at 21, and JP brief at 33.)

Judicial history:

1926 Attorney General Opinion:

The Attorney General issued an opinion regarding Regulation 14 of former Sec. 54 of Title 47, "the Secretary of

Commerce was not given power to determine in advance what this minimum amount should be for every case, and therefore he had no authority to insert such a determination as a part of any license." [1926, 35 Op.Atty.Gen. 126]

The Harvit et al. case:

The case of *Harvit Broadcasting Corp.* et al. is reported in Notice FCC 75R-344 reported in FCC Reports, 55 F.C.C. 2d 298, adopted August 21, 1975, Released September 17, 1975. In *Harvit* the Administrative Law Judge William Jensen concluded that applications by two broadcast companies should be denied, per 47 USC 324, in part because they were using excessive power for their coverage area. FCC overturned Judge Jensen's decision. FCC reversed the decision and reported,

"We agree with the Broadcast Bureau that the minimum power requirement of Section 324 was taken into consideration by the Commission at the time it established its Table of FM Channel. Assignments pursuant to Sections 303 and 307(b) and that these assignments [section references omitted] were designed to insure the fair, efficient, and equitable distribution of radio service among the several States and communities. To hold otherwise is to assume that the Commission acted in violation of Section 324 when the FM Assignment Table was established." [*Harvit* Id. 300]

FCC previous rules included keeping RF exposure as low as reasonably achievable

Joint Petitioners [JP Reply at 14] noted the relevant section of the previous FCC RF standard which states,

"Because of the limitations of the biological effects data base, these guides are offered as upper limits of exposure, particularly for the population at large. Where exposure conditions are not precisely known

> or controlled, exposure reduction should be accomplished by reliable means to values as low as reasonably achievable.' [ANSI C95.1-1982, Section 5. Explanation, page 11. Document lodged with the Court by petitioner D. Fichtenberg, Docket 00-0407].

The Second Circuit Opinion notes that the previous FCC RF guidelines were those of ANSI C95.1-1982. [A11-A12].

FCC issued its OST bulletin No. 65, to explain to its licensees how they can comply with the FCC adopted ANSI RF standards. It was released in October 1985. In its section "ANSI Protection Guides for Exposure to RF Radiation" describing the ANSI 1982 requirements, FCC explicitly notes the above paragraph and states,

"Because of 'limitations in the biological effects data base," ANSI stated that 'these guides are offered as upper limits of exposure, particularly for the population at large.' ANSI further advised that, '[w]here exposure conditions are not precisely known or controlled, exposure reduction should be accomplished by reliable means to values as low as reasonably achievable." [see OST Bulletin No. 65, p. 5-6, lodged with the Court with D.Fichtenberg Petition #00-0407].

Statement of case regarding Question #4:

Whether an agency may have delegated authority to preempt state or local public health regulations on a matter when that agency does not have expertise in that matter, when expertise is otherwise lacking, or when the preemption delegation lacks a standard?

In addition to the factual comments in the filed petitions pertaining to this question, there are addition facts that

pertain to the RF expertise of the federal health agencies during the time period of the FCC rule making. These facts indicate that even the 'expert' agencies did not have the knowledge to advise what RF limits should be for conditions of chronic exposure to RF.

In 1993 FDA wrote the FCC with regard to its proposed RF standard, IEEE C95.1-1991 (ANSI C95.1-1992). FDA said,

"With respect to the specific levels cited in the standard for Maximum Permissible Exposures and SARs. CDRH has in the past expressed concern about the 1992 guidelines. The standard, as written, lacks a full explanation of its basis. In our opinion, it is unclear what types of biological effects and exposure conditions are addressed by the standard. For example, very few research studies of long-term, low-level exposures of animals were included in the standard, despite the existence of studies that suggest an association of cancer development. Other studies have been published since finalization of the standard that strengthen this concern.

In addition, there have been insufficient studies of the health of humans who have been exposed to RF for several years or more. Although the current state of scientific knowledge does not enable us to offer a specific alternative to the exposure levels in the new standard, we do not believe this standard addresses the issue of long-term, chronic exposures to RF fields. (emphasis added).

[Letter of November 10, 1993, from Lillian J. Gill, Interim Director, Office of Science and Technology, Center for Devices and Radiological Health (CDRH) to Mr. Thomas P. Stanley of FCC. Letter in Joint Appendix of proceeding below at JA 0450-0451].

Similarly, in its 1996 letter to FCC, FDA reminded the FCC of its 1993 comments and stated,

"We also stated that we did not believe that C95.1-

> 1992 addresses the issue of long-term, chronic exposures to RF fields, and that the relevance of such questions would only increase as the use of portable and hand-held devices grows." [July 17, 1996 letter of E.D. Jacobson to FCC, at Second Circuit Joint Appendix 0616.]

Likewise, at a March 21, 1995 meeting with FCC, EPA outlined its plans for issuing RF guidelines. There it indicated that its first guidelines would be "Interim" and would "not include modulation, chronic exposure, nonthermal effects," [JA 0564, JA 0567] and that this would be addressed in a subsequent 'phase 2' EPA "final" exposure guideline. [JA 0566].

Consistent with the above, the Court of Appeals noted,

> "the parties do not dispute that RF radiation at excessive levels has thermal effects and that the ANSI and NCRP standards and thus the [FCC] Guidelines are premised on such effects." [A8]

Thus, the federal health agencies did not view the FCC RF guidelines as addressing the chronic exposure situation.

Facts on how FCC exercised its delegated authority relative to advice from federal health agencies on 2 key questions:

- **(a) What should be the RF exposure limits in public thoroughfares (sidewalks, parks, bus stops, etc.)?**

- **(b) When should cellular phone and other manufacturers of hand-held wireless phones be able to avoid evaluating if their products exceed safety limits?**

Whether FCC properly exercised its delegated authority may arguably be considered by considering facts on the extent FCC deferred to advice from the federal health agencies on the 2 key questions above. In its Brief FCC informed the

Second Circuit "shortly before the RF Order was issued, the FCC contacted each of the agencies, outlined the planned response to their comments, and solicited further input."[FCC Brief at 18] and then gave details [FCC Br. 18]. A close examination shows that the "planned response" was significantly changed when the final order was issued. Here are the specifics.

On July 1, 1996, FCC Chairman Reed Hunt sent a communication to EPA describing its proposed rules [see p.69 and JA 0614]. On July 2, 1996 Mr. Richard Smith, Chief of FCC Office of Engineering and Technology sent a similar letter to FDA [see p.72 and JA 616]. In both of these communications FCC staff indicated they proposed an approach that generally incorporated elements from both ANSI/IEEE and NCRP, and included:

1) "adoption of limits for field strength and power density limits based on *NCRP recommendations;"*

* * *

3) "deferring adoption of the ANSI/IEEE radiated power exclusion clause pending possible *future* consideration of a modified version.;"
[This means that FCC says it will defer adopting a provision that would allow manufacturers of certain 'low power' cellular phones or other devices to exclude themselves from having to evaluate if a particular product design could result in exceeding the FCC RF safety limits.] [emphasis added]

Subsequently, Arthur Firstenberg, who is President of petitioner Cellular Phone Taskforce, noticed that the actual text of the draft proposal to which FCC referred in its above

letters to EPA and FDA and to which the federal health agencies responded did not appear in the public record. Under a Freedom of Information Act (FOIA) request, he asked FCC for a copy of this draft proposal and FCC refused this request [see CPT Reply brief at 25-26, and its addendum B40-44 for A.Firstenberg's FOIA request and B45-47 for FCC's reason for refusal. Also see FCC refusal letter herein at p.80-83, especially see underlined text at p.83.]

In FCC's discussion of its refusal to release the document to which the federal health agencies responded, FCC said,

"The Report & Order [First Order] that was eventually adopted may differ in some respects from the document in question because it incorporates comments received from the Commissioners as well as staff of this agency and the staffs of some of the other agencies which received the draft pursuant to the IRAC [Interdepartment Radiation Advisory Committee] consultative process." [CPT Reply, addendum B-47, and herein at p.83]

What FCC First Order (Report & Order) actually provided regarding 1) and 3) above:

Facts regarding adoption of NCRP limits for field strength and power density [point 1)]:

When FCC released its First Order [notice FCC96-326] on August 1, 1996, it stated, "Specifically, we are adopting limits for field strength and power density that are generally based on Sections 17.4.1 and 17.4.2, and the time-averaging provisions recommended in Sections 17.4.1.1 and 17.4.3. [footnote 1 to par.#1, First Order p. 1, JA 0629 and at p.84]

NCRP RF radiation limits for field strength and power density limits in NCRP 17.4.3 provide that the more restric-

tive general population exposure limits are also to apply to public thoroughfares [through which the public passes in transit] and is to be based upon a persons average exposure over a 30 minute period. Specifically, this section notes:

> "At the same time, the 30-min time-averaging period is responsive to some special circumstances for the public at large. Examples are transient passage by the individual past high-powered RFEM [radiofrequency electromagnetic] sources, and brief exposure to civil telecommunications." [see 17.4.3 at p.79 and JA 0307] [emphasis added]

In its First Order, FCC ruled regarding RF exposure limit guidelines in public thoroughfares:

> "Occupational/controlled exposure will also apply where exposure is of a transient nature as a result of incidental passage through a location where exposure levels may be above general population/uncontrolled limits [which are 1/5th of occupational/controlled limits], as long as the exposed person has been made fully aware of the potential for exposure and can exercise control over his or her exposure by leaving the area or by some other appropriate means." [par. #43 Notice FCC 96-326, at p. 75 and JA 0644].
>
> The above policy ruling was also incorporated into Note 1 to Table 1 of 47 CFR 1.1310 (at p.75 and JA 0721)]

Facts about FCC's First Order regarding FCC deferring adoption of provisions allowing manufacturers to not evaluate if their cellular phone designs result in RF exposure exceeding safety limits [point 3)]

FCC reported that FDA indicated that an appropriate radiated power exclusion level for ensuring that the limit for the public of RF exposure to the head under 'worst case' conditions would be on the order of 180 mW at 900 MHz., where 'mW' is milliwatts of power - a milliwatt is 1/1000th of a

watt. [par. 71, FCC 96-326 (at p.75 and JA0655)].

This means that FDA said that if the amount of output power of a cellular or other hand-held phone is more than about 180 milliwatts of power, then under 'worst case' conditions there is a risk that the head of a user would absorb RF amounts above the safety limits.

FCC said it studied RF exposure from six cellular phone models operating near 900 MHz based on a "standard" operating situation for the position of the phone relative to the head. Based on such study, FCC established for such cellular phones a radiated power exclusion clause that permits manufacturers of cellular phones with less than 570 mW of output power from having to evaluate if their product may result in RF exposure that exceeds safety limits. [see par. 72, 73 FCC 96-326, [at p.76-77 and JA 0655-56].

Reasons For Granting the Petition

Summary of Argument

Pertaining to Question #2:

FCC interpretation of 47 USC 324 is that it requires FCC to establish maximum limits on power, taking 47 USC

324 into account. But this is the opposite of what Congress intended. 47 USC 324's plain sense is that within the maximum power limits FCC may set, each station, on a case by case basis, needs to take steps so that only minimum power necessary is used.

Pertaining to Question #4:

FCC and the federal health agencies acknowledged that they do not have expert knowledge on RF health effects due to chronic exposure, but admit there is evidence of adverse effects - and so could not properly consider this important factor. Hence, there is no proper authority to preempt.

Pertaining to Question #5:

Additional points not in other petitions on why FCC cannot preempt RF regulations to protect health:

- 47 U.S.C. 332(c)(3)(A) supports local regulation
- History of preemption section shows that Senate did not agree with House. Language changes all support that the Senate would not agree to preempt local health regulations.
- The syntax of the preemption, by specifying the condition that local RF regulation must be on the basis of 'environmental effects' implies there are other conditions (health) when preemption is not allowed.

Pertaining to Question #6:

If a local jurisdiction or State abandons regulation of zoning and permitting cellular phone and other personal wireless services facilities, then it would not be immune from likely tort liability suits – since there is no reasonable cause for such abandonment. This risk to liability distinguishes the FCC RF exposure preemption from other seemingly similar preemption cases. The result is the 'choice' between being forced to risk liability or to run the federal FCC RF exposure

program. This is (de facto) commandeering as described in New York v. United States, 505 U.S. 144 (1992)

Argument

Question #2: Whether the Federal Communications Commission ("FCC") lawfully declined to continue its previous requirement that microwave/radio frequency (RF) radiation exposure from its facilities be as low as reasonably achievable and considering 47 USC 324 requirement that radio stations use minimum power necessary for the desired communications?

In formulating 47 USC 324 Congress clearly is not seeking an energy conservation program per se. Rather Congress is trying to minimize any known or suspected adverse effects of radio frequency radiation - which at the time the statute was established was radio frequency interference.

Recall that in *Harvit,* FCC states its maximum power limits 'satisfy' 47 USC 324. FCC claims that,

> "To hold otherwise is to assume that the Commission acted in violation of Section 324 when the FM Assignment Table was established." [Harvit Id. 300]

This makes no sense. FCC sets maximum power limits based on wanting to prevent interference between its licensees and, according to FCC, it also considers the maximum power its licensees may need to cover their desired broadcast area. If we interpret 47 USC 324 literally, as did the opinion

at 1926, 35 Op.Atty.Gen. 126, then this statue simply says that in addition to staying within the maximum power output limits set by FCC, each station must examine its particular circumstances to strive to use minimum power.

This interpretation does not render FCC tables of maximum allowed power a violation of 47 USC 324 as FCC claims. On the contrary, it means what FCC intended to emphasize to its licensees in its OST Bulletin No. 65, page 5-6 (see p.12). Namely, that even though maximum FCC power limits are not exceeded, still licensees are to take steps to minimize the RF power to which populations may be exposed in order for licensees to reach their broadcast areas.

A purpose of the Telecommunications Act of 1996 was to secure "higher quality services for American consumers." Minimizing the RF power to which cellular phone users and the public are exposed as provided in the FCC's previous RF guidelines is one important aspect of providing such services.

Thus, there appear two ways that 47 USC 324 is interpreted. FCC says that the statute's "minimum power" requirement is met as long as FCC's "maximum power" limits are met. With due respect, it is suggested that this FCC interpretation is far from the plain meaning and in no way can be interpreted as what Congress intended. 'Maximum allowed power' is just not the same as 'minimum power necessary' without exceeding maximum limits. Minimum power needed must be determined on a case by case basis, and cannot be set in advance, as can FCC maximum limits.

When Congress told FCC to finish its rule making in ET-Docket 93-63 [Telecom. Act of 1996, sec. 704(c)] it did not authorize FCC to exceed its authority and violate federal stat-

ute, such as 47 USC 324. Therefore, whatever RF guidelines FCC might propose, they cannot conflict with 47 USC 324 as understood according to the U.S. Attorney General view at 1926, 35 Op.Atty.Gen. 126, at p.10-11]

.

Also, as noted above, FCC did not give any documentation or specifics about its methods or results when it stated seeking a "proper balance" between the needs of public health and efficient telecommunications services was the reason it did not adopt the "as low as reasonably achievable" policy (reversing its previous policy in ANSI 1982, noted above) – and such reversal appearing in conflict with the policy of Congress as given in 47 U.S.C. 324 described above.

This court has ruled, "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." [*Motor Vehicles Manufacturers Assn. v. State Farm Mutual, 463 U.S.* 29,42].

Whether the understanding of the FCC or the view of the Attorney General above is followed in the build-up of the wireless technology revolution can have a great impact. This can effect how this build-up occurs, what types of base station transmission facilities are developed, what types of cellular phones are designed, and how extensively the population is exposed to RF beyond what is as low as reasonably achievable.

For this reason it is very important for the Court to decide to consider hearing Question #2 above and deciding what 47 USC 324 requires.

Question #4: Whether an agency may have delegated authority to preempt state or local public health regulations on a matter when that agency does not have expertise in that matter or when expertise is otherwise lacking, or when the preemption delegation lacks a standard?

In addition to the comments already submitted on the above question, consider the following. The CPT petition, #00-0427, notes that the case J.W. Hampton, Jr. and Co. v. United States, 276 U.S. 394 was recently referenced in Mistretta v. United States, 488 U.S. 361, 371-372. In Hampton, J.. and Co. is noted regarding preemption authority that,

"If such a power is to be exercised at all, it can be only satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject." Hampton Jr. and Co. 276 U.S. at 406 quoting State ex rel. Railroad and Warehouse Comm'n v. Chicago, M. and St. P. R. Co., 38 Minn. 281, 301, 37 N.W. 782 (1888).

Also, this Court ruled,

> "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' [In *Motor Vehicle Mfrs. Assn. v. State Farm Mutual,* 463 U.S. 29, 43 (1983) citing *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)]

Pertaining to this standard of review, note that from the Statement of the Case for this question it is clear both EPA

and FDA acknowledge that: (1) evidence of adverse health exists below the hazard threshold upon which the FCC standard is based, (2) the FCC standard does not address the issue of chronic exposure, and (3) that these agencies do not have sufficient information to advise on what specific maximum limits should be to protect from chronic RF exposure.

Thus, based on *Motor Vehicles* above, to preempt in an area means there is sufficient knowledge about the subject to know how to decide, so important factors can be properly considered. So it seems that the only 'regulation' FCC can properly adopt when needed information is lacking to rule that local jurisdictions may set their own criteria as long as it is based upon bona fide scientific studies and public health considerations.

FCC may not argue it rules rely on the delegated authority of the federal health agencies – for there is no rational connection between FCC assertions its rules have the support of the federal health agencies and the facts in the record.

FCC justified its rules claiming these rules had the support of the federal health agencies. As noted at p.13-14, whatever support these agencies did give, they emphasized that the new FCC rules did not rely on knowledge of the long-term chronic exposure health effects of RF radiation. (see discussion above).

Moreover, it was noted at p.14-18 that perhaps two of the most important questions are:

(a) "What should be the RF exposure level in public places?"

(b) "When should manufacturers be excused from evaluating if their cellular or other hand-held phone products cause RF exposure limits to be exceed?

As shown at p.14-18, for both of these questions, FCC did not follow what it proposed to the federal health agencies in its draft. Instead of using the more stringent NCRP 17.4.3 [at p.79] 'general population limits to apply to public thoroughfares, FCC uses limits for occupational/controlled exposure that are 500% of these general population RF limits that FCC proposed to the federal health agencies to apply to public thoroughfares.

Similarly, FCC excludes from evaluation of compliance with the safety limits cellular phones (900 MHz) even though it told the federal health agencies it would defer such action regarding any type of hand-held phone. Moreover, it allows exclusion from such evaluation phones with output power up to 580 milliwatts [#72-73 at p.76-77]– which is more than 300% of what FCC said was the output power above which under worst case conditions RF exposure can exceed safety limits [#71, at p.75-76].

These two differences between what FCC proposed and what it did are not 'minor points'. Rather they are amongst the most significant points of the entire rule making. If the FCC rules are allowed to stand, then RF exposure limits will be 500% of what FCC proposed to the federal health agencies to apply to the nation's public thoroughfares (side walks, parks, beaches, bus stops, etc.) This is a major public

health issue and alone deserving of this Court reviewing whether FCC exercised proper delegated authority.

What other proposal reverses occurred between the FCC staff recommendations and what the FCC did we may never know – since FCC will not reveal the document to which agencies responded.

Therefore, FCC cannot say its guidelines have the support of the federal health agencies with delegated authority on RF health issues since neither the Court nor the public know what was in the document to which the federal health agencies responded. This Court ruled, "the agency must examine the relevant data and articulate a satisfactory explanation for its actions including a 'rational connection between the facts found and choice made.' " [Motor Vehicles Id. 43 [citations therein omitted].

Rule 10 says when a Court departs far from accepted judicial procedure, then supervision may be needed. Here the Second Circuit is not troubled that incessant FCC claims of health agency support rest on a document FCC keeps secret and admits may not reflect the final rule (p.83). Allowing this practice greatly threatens democratic process. Moreover wireless technology is sweeping the nation and the health of 100s of millions of people can be affected. These considerations justify the Court's attention. The Court need NOT decide if FCC 'flipped' on what it proposed, but only that important FCC conclusions of health agency support cannot stand when support is based on a secret document, so the rule making is unlawful. [since even FCC admits there could have been changes after the draft was seen by the health agencies [p.83]

Question 5. Whether FCC may imply "environmental effects" in 47 USC 332(c)(7)(B)(iv) includes "health effects", since PL 104-104 sec. 601 prohibits implied preemption

and sec. 253(b) provides for States protecting public safety?

In addition to the argument in petitions of Worsham and Fichtenberg, consider the following:

1. Local regulation to protect health is within the permitted by the provisions of 42 USC 332(c)(3)(A) [at p.44] regarding the "other terms and conditions" local jurisdictions can regulate. The Committee report explicitly mentions zoning authority is retained without any restrictions [p.46]. Therefore, Congress has explicitly granted authority to regulate RF radiation to protect health, and unless it later explicitly limited such authority, FCC is powerless to exceed its authority and preempt what Congress has said is off limits to FCC. Thus, while Congress certainly permitted FCC to regulate the operations of its licensees bar local jurisdictions for also doing likewise, particularly regarding zoning authority and to protect health.

2. In the same section 47 USC 332, are the different terms 'safety of life' [47 USC 332(a) at p.44] and the contested "environmental effects" in 332(c)(7)(B)(iv). Different terms mean different things. Accordingly, the preemption pertaining to 'environmental effects' does not pertain to local regulations to protect safety of life, including regulation to protect the public health from RF radiation from FCC licensed facilities.

3. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) definitions define "environment" without any reference to health (p. 37).

4. The legislative history favors preventing such FCC preemption. While HR 1555 and its Committee report strongly supports the FCC position, the Joint Conference report does not. Because:
   (a) The Senate version of the Bill did not even include a

zoning preemption section as did the House. This suggests the Senate did not accept the findings of the House of Representatives.[p.47-49, p.51]

(b) Mention in HR 1555 Committee Report of the need for "uniform, consistent requirements with adequate safeguards of the public health and safety" are completely removed from the final Joint report.

(c) The Joint version removes entirely any direction to FCC about protecting health [p.55] and refers only to 'environment.' Congress is expected to provide direction when it issues a preemption., especially to protect the public health. Accordingly, if Congress intended to preempt health, one is hard-pressed to explain why Congress would remove direction for such preemption (although arguably inadequate) from the House Committee report. Similarly, if the Joint Committee [p.53-56] intended to preempt local RF radiation public health and safety regulations it would not have removed language already in the House Committee report explaining this was intended.

5. 47 USC 253(b) [at p.40] explicitly provides for States being able to regulate to protect the "public safety and welfare" even if it may cause a 'barrier to entry.' As a separate basis for State authority the section also authorizes States to "safe guard the rights of consumers;" The Committee text chooses to explain only what such safeguarding may includes. So this was all that was thought in need of clarification. Just because it was not commented upon, it is still a valid State authorization.

6. Both previous and present FCC regulations set no compli ance requirements for staying within its RF limit guide lines – other than to submit an "Environmental Asses sment" if limits are exceeded. It is very challenging to believe that Congress intended local RF public health

compliance limits to be replaced by a the requirement merely that an operator must submit some "Environmental Assessment" when his facilities exceed FCC RF guidelines.

See par. #4 of NPRM, JA 0376 showing this FCC policy was in effect at least from 1985 and continuing in effect when the preemption statute became law. In its First Order (Report & Order) FCC acknowledges, "As was true for the previous rules, there are no specific compliance requirements as such." [Appendix A, Final Regulatory Flexibility Analysis, Sec.IV. subsection: Other compliance requirements, at p.78, JA 705]

Here FCC argues that the requirement to do an EA is a "de facto compliance requirement" in order "to avoid the preparation of a costly and time-consuming EA." But FCC provides no data for such a conclusion, and admits there is little data since "EAs are rarely filed." Indeed, FCC needs to explain why it disbelieves that the more likely scenario are computer generated reports run off a 'paper-mill' requiring almost no time or cost.

7. The 'conditional phrasing' of the syntax of the preemption statute argues against the FCC and Second Circuit interpretation.

The statute does not say that under all circumstances are local jurisdiction regulations of RF to be preempted if they are more stringent than those of the FCC. Rather, only if they are based "on the environmental effects" of RF radiation. Thus, the very syntax implies there are conditions for which local jurisdiction regulation of RF may not be preempted. What else could this be but to protect the public health?

Question #6: Whether Congress in 47 U.S.C. 332(c)(7)(B)(iv), by preempting local jurisdictions from regulating RF radiation, gave jurisdictions 'no choice' but to implement

FCC rules, or to be compelled if they refused, has de facto commandeered states or local jurisdictions to run a federal program, in violation of the 10th amendment?

In addition to the comments in submitted petitions on this question,, consider the following amplification on the comment in petition #00-407 that,

> "Since such dangers of risk to property are so obvious and there is no benefit to the community by so abandoning [regulation of personal wireless services facilities], that any jurisdiction that reverses its present course of zoning and permitting such facilities puts itself at liability risk." [at p. 36 of #00-047].

The Court has noted,

"For a court or jury, in the guise of a tort suit, to review the reasonableness of the city's judgment on these matters [policy making decisions] would be an infringement upon the powers properly vested in a coordinate co-equal branch of government. [*Owen v. City of Independence*, 445 U.S. 622, 648 (1980)] Citing *Johnson v. State*, 69 Cal. 2d 782, 794, n.8 447 P.2d 352, 361 n.8 (1968) (en banc) ("Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government.").

The Court continues,

"In order to ensure against any invasion into the legitimate sphere of the municipality's policy making process, courts have therefore refused to entertain suits against the city for "either the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character." *Owen* Id. 648 and citations therein.

But one question is how "in good faith" could a local jurisdiction reverse its requiring personal wireless services facilities to be subject to zoning and permitting regulations?

The Supreme Court has stated,
"Revocation constitutes a reversal of the agency's former views as to the proper course. * * * Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." [*Motor Vehicle Mfrs. Assn. v. State Farm Mutual,* 463 U.S. 29, 42.]

While the above was applied to federal agencies, the same reasoning applies to a test of "in good faith" should a local jurisdiction abandon zoning and permitting of cellular towers and other personal wireless services facilities. What good reason could a jurisdiction give to demonstrate 'in good faith'?

Abandonment would subject the public and businesses to risk of damage to property and life and damage to the characteristics of neighborhoods. In *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688, 703 (4th Cir. 2000) Fourth Circuit Judge Niemeyer notes some of these obvious disastrous consequences.

Could the local jurisdiction claim it wanted to avoid approving facilities based on FCC guidelines? No. It makes no sense. By abandoning the field with no federal program to take its place, the City is giving its implicit approval for any cellular phone tower or other personal wireless services facility to be built any way any where.

Could the local jurisdiction claim it would let a fed-

eral program license such facilities and so let the federal program feel the brunt of public displeasure? No. Because it is the local jurisdiction that will face any liability and other consequences of such abandonment, given there is no federal zoning and permitting program. Thus the essential "in good faith" test that provides local jurisdiction immunity would fail.

Accordingly, "The innocent individual who is harmed by an abuse of government authority is assured that he will be compensated for his injury." *Owen* Id. 657. Since no rational reason could be given for a local jurisdiction to abandon the above zoning and permitting, with no suitable federal program to take its place, there are good grounds to believe that such abandonment would be considered an abuse of government authority.

In Owen, the Court also noted, "[B]y the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality in its charter or by statute, the State had impliedly withdrawn city's immunity from liability for nonperformance or misperformance of its obligation." *Owen* Id. at 646 with citations therein.

If the Court will grant hearing this question, then numerous examples of State law requiring its local jurisdictions to act to protect property from damage will be cited. Since there is no rational basis a local jurisdiction could offer for abandoning cellular tower zoning and permitting when there is no federal program suitable to take its place, as noted above, local jurisdictions subject to such State requirements will be liable for damages to property due to such abandonment.

The Court also noted that under 42 USC 1983, relief from deprivation of 14th amendment rights might be brought to a federal court, that "a municipality can be li-

able under1983 only where its policies are the "moving force [behind] the constitutional violation." [*Canton v. Harris*, 489 U.S. 378, 389 (1989) (with citations therein).

The Court continued, "Only where a municipalities failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under 1983." *Canton* Id. at 389. It is blatantly obvious what the adverse impacts would by on endangering lives and property should a municipality abandon zoning and permitting of cellular phone towers when there is an absence of a suitable federal program to take its place, as Judge Niemeyer notes above. Hence, such abandonment would subject the jurisdiction to liability risk.

For the above reasons, the choice of abandonment is a choice to take on significant liability risk. This 'choice' to accept a liability risk was found in *New York v. United States*, 505 U.S. 144 (1992) to be a commandeering of state or local government and thus unconstitutional.

> "Because an instruction to state governments to take title to waste standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two." *New York* Id. at 505 U.S. 144, 176.

Since the 'choice' of abandonment results in damage and liability risk it is no real choice, and for reasons the same as New York (regulate or accept liability) the preemption is de facto commandeering of state or local government.

The above provides important characteristics of this preemption that distinguishes it from other related Supreme Court cases. For example in *Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264, the Court held there was no commandeering and valid preemption in part because "If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government." *Hodel* Id. at 288.

However, in our case, if local jurisdictions abandoned zoning and permitting of cellular phone towers and other personal wireless services facilities there is no suitable federal program to take its place.

In *Federal Energy Regulatory Commission (FERC) v. Missippi,* 456 U.S. 742, the Court did entertain the option that the choice put to the States – that of either abandoning regulation of the field altogether or considering federal standards – may be a difficult one. And that is particularly true when Congress, as is the case here, has failed to provide an alternative regulatory mechanism. " [*FERC* Id. at 766].

However, in the case of *FERC*, abandonment of a state utility regulatory authority would not lead to the chaos and risk to loss of life and property were cellular phone tower zoning abandoned. Nor would it put the state or local jurisdiction at likely liability risk. Rather, abandonment could merely affect utility rates, procedures for hearing complaints, and related utility matters and which occurred already for existing unregulated utilities.

Similarly, in *Garcia v. San Antonio*, 460 U.S. 528, if the San Antonio Metropolitan Transit Authority abandoned the field of transit services, it may likely cause

transit difficulties for the public and business. However, these difficulties would not put the authority at liability risk, as would the abandonment required to avoid regulating according to the FCC RF exposure preemption.

Therefore for the above reasons, while FCC in its brief before the Second Circuit used *Hodel, FERC* and *Garcia* to justify the constitutionality of its preemption [FCC Brief at 41-43] its reliance on these cases is misplaced. Similarly, Judge King in Petersburg Cellular gives arguments similar to those of the FCC and which are likewise misplaced. The test is not whether a local jurisdiction function is 'traditional' or not – which *Garcia* said was no longer a helpful criteria. Rather a proper test criteria is whether by abandoning a critical local jurisdiction function when there is no suitable federal program to take its place, the local jurisdiction puts itself at liability risk or otherwise must face not a difficult choice, but an 'impossible' choice.

For example, suppose the section of the Brady gun control act found unconstitutional in *Printz v. United States*, 521 U.S. 898 (1997) was crafted in an alternative form to appear as a conditional preemption, similar to the language in FERC. That is, suppose just like FERC stated that 'if there is a state utility authority' it must do certain things, suppose a hypothetical Brady gun control act said 'if a local jurisdiction has a chief law enforcement officer ("CLEO"), then the local jurisdiction must require the CLEO to do certain things. Like FERC, would the Court say, "Nothing requires the local jurisdiction to act as provided. It has the choice – although 'a difficult one' of abandoning the field of law enforcement"? Abandoning state utility regulation is a possible choice, but abandoning law enforcement is not.

The 'choice' of abandoning law enforcement would cause such chaos and loss of life and property, and put the jurisdiction at liability risks, is an impossible choice. Likely the

Court would find it so and rule that this hypothetical reformulation of the unconstitutional Brady gun control provision is de facto commandeering and still unconstitutional regardless of the guise in which it is worded.

In a similar manner the FCC preemption in this case also presents an impossible choice of abandonment. The FCC preemption that provides the forced choice of accepting liability (or other impossible choice) or regulate according to the federal program – becomes 'de facto' commandeering based on the principles in *New York* above, and is unconstitutional.

Conclusion

For the above additional reasons a writ of certiorari should be granted for the supported petitions.

Respectfully submitted,

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Appendix B

40 CFR § 302.3 Definitions.

As used in this part, all terms shall have the meaning set forth below:

The Act, CERCLA, or Superfund means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Pub. L. 96-510);

Administrator means the Administrator of the United States Environmental Protection Agency (``EPA''); Consumer product shall have the meaning stated in 15 U.S.C. 2052;

Environment means (1) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act of 1976, and (2) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient 304air within the United States or under the jurisdiction of the United States;

42 USC Sec. 1983

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken

in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

47 U.S.C. Sec. 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to

require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public
rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for
designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply--

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

Senate Conference Report No. 104-230, 104th Cong. 2d Sess. 253--REMOVAL OF BARRIERS TO ENTRY

Senate bill

Section 20(a) adds a new section 254 to the Communications Act and is intended to remove all barriers to entry in the provision of telecommunications services.

Subsection (a) of new section 254 preempts any State and local statutes and regulations, or other State and local legal requirements, that may prohibit or have the effect of prohibiting any entity from providing interstate or intrastate telecommunications services.

Subsection (b) of section 254 preserves a State's authority to impose, on a competitively neutral basis and consistent with universal service provisions, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. States may not exercise this authority in a way that has the effect of imposing entry barriers or other prohibitions preempted by new section 254(a).

Subsection (c) of new section 254 provides that nothing in new section 254 affects the authority of States or local governments to manage the public rights-of-way or to require, on a competitively neutral and nondiscriminatory basis, fair and reasonable compensation for the use of public rights-of-way, on a nondiscriminatory basis, provided any compensation re-

quired is publicly disclosed.

Subsection (d) requires the Commission, after notice and an opportunity for public comment, to preempt the enforcement of any State or local statutes, regulations or legal requirements that violate or are inconsistent with the prohibition on entry barriers contained in subsections (a) or (b) of section 254.

Subsection (e) of new section 254 simply clarifies that new section 254 does not affect the application of section 332(c)(3) of the Communications Act to CMS providers.

Section 309 adds a new section 263 to the Communications Act and is intended to permit States to adopt certain statutes or regulations regarding the provision of service by competing telecommunications carriers in rural markets. Such statutes or regulations may be no more restrictive than the criteria set forth in section 309. The Commission is authorized to preempt any State statute or regulation that is inconsistent with the Commission's regulations implementing this section.

House amendment

The House provisions are identical or similar to subsections 254(a), (b) and (c). The House amendment does not have a similar provision (d) requiring the Commission to preempt State or local barriers to entry, if it makes a determination that they have been erected.

Conference agreement

The conference agreement adopts the Senate provisions.

New section 253(b) clarifies that nothing in this section shall affect the ability of a State to safeguard the rights of consumers. In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of elec-

tric, gas, water or steam utilities, to the extent such utilities choose to provide telecommunications services. Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive utility ratepayers from the potential harms caused by such activities are not preempted under this section. However, explicit prohibitions on entry by a utility into telecommunications are preempted under this section.

The rural markets provision in section 309 of the Senate bill is simplified and moved to this section. The modification clarifies that, without violating the prohibition on barriers to entry, a State may require a competitor seeking to provide service in a rural market to meet the requirements for designation as an eligible telecommunications carrier. That is, the State may require the competitor to offer service and advertise throughout the service area served by a rural telephone company. The provision would not apply if the rural telephone company has obtained an exemption, suspension, or modification under new section 251(f) that effectively prevents a competitor from meeting the eligible telecommunications carrier requirements. In addition, the
provision would not apply to providers of CMS.

47 U.S.C. Sec. 309. Application for license

[In 1993 Pub. L. 103-66, Sec. 6002(a), added subsec. (j).]

(j) Use of competitive bidding

Subsec. (j). Pub. L. 103-66, Sec. 6002(a), added subsec. (j).

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission

shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combina-

tions or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum; and (E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed--

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

47 USC Sec. 332. Mobile services
(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will--

(1) promote the safety of life and property;
(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;
(3) encourage competition and provide services to the largest feasible number of users; or
(4) increase interservice sharing opportunities between private mobile services and other services.

47 USC 332(c) Regulatory treatment of mobile services
(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(1) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(2) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

House Report 103-111 of 103rd Congress, 1st Sess. 261 (1993). Comments on 47 U.S.C. 332(c)(3)(A)

It is the intent of the Committee that the States still would be able to regulate the terms and conditions of the services. By, 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g. zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under 'terms and conditions'.

Bill

House Bill HR 1555. SEC. 107. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) National Wireless Telecommunications Siting Policy.--Section 332(c) of the Act (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

``(7) Facilities siting policies.--(A) Within 180 days after enactment of this paragraph, the Commission shall prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services.

``(B) Pursuant to subchapter III of chapter 5, title 5, United States Code, the Commission shall establish a negotiated rulemaking committee to negotiate and develop a proposed policy to comply with the requirements of this paragraph. Such committee shall include representatives from State and local governments, affected industries, and public safety agencies. In negotiating and developing such a policy, the committee shall take into account--

``(i) the desirability of enhancing the coverage and quality of commercial mobile services and fostering competition in the provision of such services;

``(ii) the legitimate interests of State and local governments in matters of exclusively local concern;

``(iii) the effect of State and local regulation of facilities siting on interstate commerce; and

``(iv) the administrative costs to State and local governments of reviewing requests for authorization to locate facilities for the provision of commercial mobile services.

``(C) The policy prescribed pursuant to this paragraph shall ensure that--

``(i) regulation of the placement, construction, and modification of facilities for the provision of commercial mobile services by any State or local government or instrumentality thereof--

``(I) is reasonable, nondiscriminatory, and limited to the

minimum necessary to accomplish the State or local government's legitimate purposes; and

``(II) does not prohibit or have the effect of precluding any commercial mobile service; and

``(ii) a State or local government or instrumentality thereof shall act on any request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services within a reasonable period of time after the request is fully filed with such government or instrumentality; and

``(iii) any decision by a State or local government or instrumentality thereof to deny a request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services shall be in writing and shall be supported by substantial evidence contained in a written record.

``(D) The policy prescribed pursuant to this paragraph shall provide that no State or local government or any instrumentality thereof may regulate the placement, construction, modification, or operation of such facilities on the basis of the environmental effects of radio frequency emissions, to the extent that such facilities comply with the Commission's regulations concerning such emissions.

``(E) In accordance with subchapter III of chapter 5, title 5, United States Code, the Commission shall periodically establish a negotiated rulemaking committee to review the policy prescribed by the Commission under this paragraph and to recommend revisions to such policy.".

(b) Radio Frequency Emissions.--Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) Availability of Property.--Within 180 days of the enactment of this Act, the Commission shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for

the placement of new telecommunications facilities by duly licensed providers of telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable cost-based fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

House Committee Report 104-204, 104th Cong. 1st. Sess. Section 107. Facilities Siting; Radio Frequency Emission Standards

Section 107 provides that within 180 days of enactment, the Commission is to prescribe a national policy for the siting of commercial mobile radio services facilities. Representatives of affected industries, State and local governments and public safety agencies are to be included in the negotiation committee. It is the Committee's intent that the Commission establish a negotiated rulemaking committee authorized by the Negotiated Rulemaking Act of 1990 (subchapter III of chapter 5, Title 5 of the U.S. Code) comprised of representatives of State and local governments, public safety agencies and affected wireless telecommunications (Commercial Mobile Radio Service)
industries. The committee is to develop a uniform national policy for the siting of Commercial Mobile Radio Service (CMRS) facilities for antennas, cell sites and other infrastructure-related equipment necessary to provide efficient wireless telecommunications services to the public.

The committee's recommendations must ensure that (1) State and local regulation is reasonable, nondiscriminatory, and the minimum necessary and does not have the effect of precluding any commercial mobile service; (2) siting requests are acted upon within a reasonable period of time; and (3) denials of requests are issued in writing and supported by substantial evidence. The siting of facilities cannot be denied on the basis of Radio Frequency (RF) emission levels which are in compliance with Commission RF emission regulated levels. The Commission is to complete within 180 days its action on RF emission standards. The Federal Government, within 180 days after enactment, is to prescribe procedures to make available to wireless telecommunications providers property and rights-of-way under its control on a fair, reasonable and nondiscriminatory basis.

The Committee finds that current State and local
requirements, siting and zoning decisions by non-federal units

of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network. The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible. Such requirements will ensure an appropriate balance in policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services.

The Committee recognizes that there are legitimate State and local concerns involved in regulating the siting of such facilities and believes the negotiated rulemaking committee should address those matters, such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way. The intent of the Committee is that requirements resulting from the negotiated rulemaking committee's work and subsequent Commission rulemaking will allow construction of a CMRS network at a lower cost for siting and construction compatible with legitimate public health, safety and property protections while fully addressing the legitimate concerns of all affected parties and providing certainty for planning and building.

The Committee has received substantial evidence that local zoning decisions, while responsive to local concern about the potential effects of radio frequency emission levels, are at times not supported by scientific and medical evidence. A high quality national wireless telecommunications network cannot exist if each of its component must meet different RF standards in each community. The Committee believes the Commission rulemaking on this issue (ET Docket 93-62) should contain adequate, appropriate and necessary levels of protection to the public, and needs to be completed expeditiously. No State or local government, solely on the basis of RF emissions, should block the construction of sites and fa-

cilities or installation of equipment which comply with the Commission RF standards. The Commission is directed to develop and issue procedures to make available to the maximum extent possible the use of Federal Government property, rights-of-ways, easements and any other physical instruments and appropriate assets that could be used as CMRS facilities sites that do not conflict with the intent of other Federal laws and regulations. The Committee recognizes, for example, that use of the Washington Monument, Yellowstone National Park or a pristine wildlife sanctuary, while perhaps prime sites for an antenna and other facilities, are not appropriate and use of them would be contrary to environmental, conservation, and public safety laws.

B17

TELECOMMUNICATIONS ACT OF 1996
Senate Conference Report No. 104-230, 104th Cong. 2d Sess. 704—Facilities siting, radio frequency emission standards

Senate bill :
No provision.

House amendment

Section 108 of the House amendment required the Commission to issue regulations within 180 days of enactment for siting of CMS. A negotiated rulemaking committee comprised of State and local governments, public safety agencies and the affected industries were to have attempted to develop a uniform policy to propose to the Commission for the siting of wireless tower sites.

The House amendment also required the Commission to complete its pending Radio Frequency (RF) emission exposure standards within 180 days of enactment. The siting of facilities could not be denied on the basis of RF emission levels for facilities that were in compliance with the Commission standard.

The House amendment also required that to the greatest extent possible the Federal government make available to use of Federal property, rights-of-way, easements and any other physical instruments in the siting of wireless telecommunications facilities.

Conference agreement

The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement. The

conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or
modification of CMS facilities should be terminated.

When utilizing the term `functionally equivalent services' the conferees are referring only to personal wireless services as defined in this section that directly compete against one another. The intent of the conferees is to ensure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services described in this section unreasonably favor one competitor over another. The conferees also intend that the phrase `unreasonably discriminate among providers of functionally equivalent services' will provide localities with the flexibility to treat
facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.

Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services. It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.

B19

Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.

The phrase `substantial evidence contained in a written record' is the traditional standard used for judicial review of agency actions.

The conferees intend section 332(c)(7)(B)(iv) to prevent a State or local government or its instrumentalities from basing the regulation of the placement, construction or modification of CMS facilities directly or indirectly on the environmental effects of radio frequency emissions if those facilities comply with the Commission's regulations adopted pursuant to section 704(b) concerning such emissions.

The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.

The conferees intend that the court to which a party appeals a decision under section 332(c)(7)(B)(v) may be the Federal district court in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal, and that the courts act expeditiously in deciding such cases. The term `final action' of that new subparagraph means final administrative action at the State or local government level so that a party can commence action under

the subparagraph rather than waiting for the exhaustion of any independent State court remedy otherwise required.

With respect to the availability of Federal property for the use of wireless telecommunications infrastructure sites under section 704(c), the conferees generally adopt the House provisions, but substitute the President or his designee for the Commission.

It should be noted that the provisions relating to telecommunications facilities are not limited to commercial mobile radio licensees, but also will include other Commission licensed wireless common carriers such as point to point microwave in the extremely high frequency portion of the electromagnetic spectrum which rely on line of sight for transmitting communication services.

Appendix C: Affidavits and other documents

- Alison Rall: Reports shortly after a 400 foot cellular tower was erected next to their farm that their beef herd became sickly, egg production dropped, wild fowl left the area, dairy cows had "many miscarriages, birthing problems, suckling problems, and many of them developed tumors. * * * Our five children all began experiencing frequent nosebleeds, hair loss, weight loss, and kidney problems."

- **David Fichtenberg:** "Because of our purpose, AHA (Ad Hoc Association), and I believe all of our members, want to influence local public officials so they may establish regulation of RF more stringent than those of the FCC to protect health, safety, and quality of life. * * * AHA has been harmed because it believes its members and the public it serves would likely have benefited from more stringent RF exposure limits had the studies it submitted to the FCC been evaluated.

- **Charles R. Manville:** "In June 1997 [one month after installation of a cellular tower I began to experience frequent headaches and dizziness when I was at my home on Willis Hill. * * * Until I began to experience headaches and dizziness in June, I had never experienced recurrent headaches or dizziness and had been in excellent health. * * * In September I spent a week on Penobscot Bay, Maine and my headaches went away completely. Those headaches and dizziness returned within a day of my return to Willis Hill.

Affidavits continued:

- **Janet and Dale Newton, Lorinda Knowlton, Roger H. Knowlton, D.O.** :"When I attended hearings on this subject [cellular phone tower zoning and permitting] I was informed that there could be no discussion in the record on environmental or health concerns again for fear of a court challenge by any provided that decisions were even indirectly based on health or environment concerns."

- D. Fichtenberg, supplementary affidavit:

Declaration of
David Fichtenberg
PO Box 7577
Olympia, WA 98507-7577

Pertaining to Supreme Court of the United States,
Petition for certiorari of David Fichtenberg, docket #00-0407

I, David Fichtenberg, hereby declare that I am over 21 years old and reside in King County of the State of Washington.

On June 10, 1998, I submitted an affidavit pertaining to Court of Appeals for the Second Circuit consolidated cases 97-4328(L), 98-4003 (Con.), 98-4005 (Con.), 98-4025(Con.), 98-4122(Con.). Since then, significant changes of which I am aware are: (1) parties who were Ad Hoc Association members and whose interest Ad-Hoc Association had sought to represent in the Second Circuit proceeding above have since chosen to have their interests and representation furthered through the law firm of Landy & Seymour. They have had a Petition for Writ of Certiorari filed in their behalf (Citizens for Appropriate Telecommunications Facilities et al. ("Citizens"), docket #00-00393) by counsel of record Whitney North Seymour, Jr. of the firm of Landy & Seymour. Among these are persons whose names also appear in

my June 10, 1998 affidavit are Dorothy Miller, Holly Fournier, and Libby Kelly. Please see the Citizens petition for a complete list of the names of these parties. (2) Also a motion to the Second Circuit in the above proceeding there was filed August 27, 1998 to correct my June 10, 1998 affidavit by clarifying that Cellular Phone Taskforce was not a member of Ad-Hoc Association.

I remain President of Ad-Hoc Association. Some of our members who participated in the proceeding below are Alan Golden, Virginia J. Moore-Ward, Rainer Waldman Atkins, Michael C. Worsham, Bill Jenkins, and Faye Mueller-Hebert. My principal duties are to carry out the Ad-Hoc Association mission is described in my June 10, 1998 affidavit, at pages 11-15 of my above petition for writ of certiorari, and at pages 2-6 of the principal brief in which Ad-Hoc Association and I joined in the Second Circuit proceeding. I am being harmed in carrying out my duties for Ad-Hoc Association in the manner as described in these referenced pages for Ad-Hoc Association to further its mission.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on: October 4, 2000

Signed: /s/ David Fichtenberg

_____

David Fichtenberg

C4 (60)

Notice that all parties to proceeding below, except CPT Joined in same brief and reply

October 7, 1998

Carolyn Clark Campbell, Clerk
U.S. Court of Appeals for the Second Circuit
United States Court House, 40 Foley Square
New York, New York 10007

Re: Cellular Phone Taskforce, No. 97-4328, and consolidated cases

Attention: Michael Adragna

Dear Ms. Campbell:

Petitioners in the referenced cases filed initial briefs May 22, 1998 and reply briefs July 27, 1998. Two of the Petitioners, Ad-Hoc Association et al. and CWA filed jointly. The second set of briefs came from a single party, Cellular Phone Taskforce.

As you know, the caption of the case recites the names of a number of other individuals and associations who are participating in the appeals. Originally, they were co-petitioners, with Ad-Hoc Association, in Nos. 98-4003 or 98-4025 filed respectively in the D.C. and Ninth Circuits.

The purpose of this letter is to clarify that these individuals and associations are also joined – through common representation with Ad-Hoc Association – in the initial and reply briefs submitted by Ad-Hoc Association and CWA. Specifically, all the captioned parties except Cellular Phone Taskforce are joined in the briefs submitted by Ad-Hoc Association and CWA/CWA Local 7810.

We appreciate the Court's indulgence in permitting this clari-

fication. Please direct any questions to the undersigned.

Sincerely,

/s/ James R. Hobson
James R. Hobson
Counsel for Ad-Hoc Association et al.

c.c. Michael Adragna; all parties of record

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of RAINER VALLEY ASSOCIATION FOR SAFE WIRELESS TECHNOLOGY	Hearing Examiner File No. MUP-96-038 DCLU File No. 9603542

ORDER OF DISMISSAL

This matter involves property located at 4213 South Orcas Street. Under application 9603542, the applicant (the Walter Group) proposed construction on the property of a minor communication utility consisting of 12 panel type antennae. On October 10, 1996, DCLU published notice of its decision, in which it recommended that the required Council Conditional Use be granted, and in which it entered a Determination of Non-Significance (DNS). The effect of a DNS is to relieve the applicant of the need to prepare an Environmental Impact Statement (EIS).

On October 24, 1996 David Fichtenberg filed an appeal on behalf of the Rainier Valley Association for Safe Wireless Technology, challenging the failure of DCLU to require an EIS. That appeal was based on the possible environmental impacts of the radiofrequency radiation that would be associated with the proposed facility.

On October 31, 1996, the applicant (the Walter Group) filed a motion with the Hearing Examiner seeking dismissal of the

appellant's SEPA appeal. In this motion, the applicant argued that the federal government had preempted the ability of State or local government to regulate wireless service facilities on the basis of the environmental effects of radio frequency emissions.

A response to the applicant's motion was filed by the appellant on November 12, 1996. In that response, the appellant contested whether the federal government had, indeed, preempted local control over questions of radio frequency emissions. The appellant also argued that even if there was preemption, an EIS should still be prepared.

As to the first issue, the Telecommunications Act of 1996 added the following paragraph (iv) to 47 USC sec. 332(c):

> "No State or local government or instrumentality thereof may regulate the placement, construction or modification of personal wireless services facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communication] Commission's regulations concerning such emissions."

In August of 1996, the FCC issued its "Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation [ET Docket 93-62 (FCC 96-326)]. That order adopted Maximum Permitted Exposure (MPE) standards.

The proposed facility complies with the FCC's MPE standards. Accordingly, the City of Seattle is preempted from regulating the proposed minor communications utility on the basis of the environmental impacts of its radio frequency emissions.

The second issued then is whether, in the face of this preemption, the Hearing Examiner retains the ability to require an EIS in this case. The answer to that question is "no."

SMC 25.05.340(A) provides that a DNS is appropriate when the responsible official determines that "there will be no probable sufficient environmental impacts from a proposal . . . . SMC 25.05.4000 sets forth the purpose of an EIS; Paragraph B provides that an EIS "shall inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality."

The appellant's appeal is based entirely on the possible environmental effects of RF radiation. Therefore, to reverse the Department in this case, the Examiner would have to determine that environmental impacts of RF radiation, the very thing over which the City has no jurisdiction, creates a "probable significant impact." Moreover, because the City is preempted from regulating the proposed facility on the basis of the environmental effects of RF radiation, any EIS prepared to explore those impacts could not be used to regulate or mitigate whatever adverse impacts there were revealed. This would be an absurd result.

This is not to suggest that the construction of a minor communications utility could never require the preparation of an EIS. Such a requirement could still be appropriate when other impacts from protected City viewpoints, etc. were at issue. However, such concerns were not raised by this appeal.

On the basis of the above, this appeal from the Determination of Non-significance entered by DCLU in this case should be, and hereby is, DISMISSED. The pubic hearing on November 26, 1996 will be limited to testimony and evidence regarding the proposal's compliance with the requirements for a council conditional use.

Entered this 14th day of November, 1996.

/s/ Guy E. Fletcher
Guy E. Fletcher, Deputy Hearing Examiner

C 9

Office of Hearing Examiner
Room 1320 Alaska Building
618 Second Avenue
Seattle, WA 98104
(206) 684-0521
(2 0 6) 6 8 5 - 0 5 3 6 (F A X)

C10

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of SEATTLITES FOR APPRORIATE ANTENNAS IN OUR NEIGHBORHOODS (SAANE)	Hearing Examiner File No. W-99-010
from a Determination of Nonsignificance (DNS) by the Director of the Department of Design, Construction, and Land Use	ORDER ON MOTION TO DISMISS

The Department has moved to dismiss certain issues from the above-referenced appeal. Both the Department and the appellant have submitted written information regarding the motion, and the motion was discussed at the prehearing conference on this matter. The appeal issues are identified in the appellant's appeal letter dated November 3, 1999. At the conference, appellant and the Department agreed that the issue pertaining to failure to provide notice of the DNS should be dismissed.

Many of the other issues raised by the appellant's appeal letter are not properly the subject of a SEPA appeal in this case, for they relate to matters that are not changed by the ordinance. The appellant has argued that the failure to amend the ordinance (in particular, the radio frequency (RF) standards) in certain ways will have an impact.

* * *

Entered this 6th day of December, 1999

/s/ Anne Watanabe
Anne Watanabe, Deputy Hearing Examiner
Room 1320 Alaska Building
618 Second Avenue
Seattle, WA 98104-2222
(206) 684-0521
FAX: (206) 684-0536

C12

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of SEATTLITES FOR APPRORIATE ANTENNAS IN OUR NEIGHBORHOODS (SAANE)	Hearing Examiner File No. W-99-010

from a Determination of Nonsignificance (DNS) by the Director of the Department of Design, Construction, and Land Use

The Director issued as Determination of Non-Significance (DNS) regarding a proposal to amend Title 23 and Title 25 of the Seattle Municipal Code. The appellant exercised the right to appeal pursuant to SMC 25.05.680.

The appeal hearing was held on December 13, 1999, before the undersigned Deputy Hearing Examiner (Examiner). Parties represented at the proceeding were: the appellant, SAANE et al, by David Fichtenberg; and, the Director, Department of Design, Construction, and Land Use (DCLU by Bernard J. Glynn Jr., Assistant City Attorney.

* * *

The Determination of Nonsignificance issued by the Director is hereby AFFIRMED.

Entered this 5th day of January, 2000.

/s/ Anne Watanabe
Anne Watanabe
Deputy Hearing Examiner

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

Office of
The Chairman

Federal Communications Commission
Office of the Secretary

July 1, 1996

The Honorable Carol M. Browner
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Carol:

I am writing to follow-up on our phone conversation of several weeks ago regarding radiofrequency (RF) emissions and Commission's efforts to update and amend the guidelines we use for evaluating human exposure to environmental RF energy emitted by FCC-regulated transmitters. This is one of the more important issues we are wrestling with, and I believe it is critical that we do all we can to protect the public and workers from any potential health effects from the radio services we license.

As you know, in 1993, the FCC released a Notice of Proposed Rule Making (NPRM; ET Docket 93-62) seeking public comment on these issues. At that time we requested that EPA and other federal agencies with responsibilities for health and safety comment on the various issues raised in the NPRM including our proposal to adopt the guidelines developed by the Institute of Electrical and Electronics Engineers.

Inc., (IEEE), and later endorsed by the American National Standards Institute (ANSI), designated ANSI/IEEE C95. 1-1992. In response, we received comments from the EPA as well as the Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), and the National Institute for Occupational Safety and Health (NIOSH).

The federal health and safety agencies generally expressed support for our efforts to update our RF exposure guidelines. However, comments from our sister agencies included recommendations for alternatives to our original proposal to adopt the ANSI/IEEE guidelines. For example, the EPA recommended that we consider adopting certain features of the ANSI/IEEE guidelines along with others recommended by the National Council on Radiation Protection and Measurements (NCRP). In many ways the ANSI/IEEE and NCRP guidelines are similar. However, as pointed out by the EPA, there are certain significant differences. For example, the EPA expressed its opinion that at microwave frequencies the limits specified by NCRP would be preferable. Likewise, NIOSH believed that it would be more appropriate to use the MPE limits recommended by NCRP, but did support the adoption of the ANSI/IEEE limits on induced RF currents. The FDA generally supported our adoption of the ANSI/IEEE standard, but expressed significant concern about the radiated power exclusion clause included in the standard. Similarly, the Occupational Safety and Health Administration (OSHA) generally supported the ANSI/IEEE standard, but objected to the way it defined the use of two different exposure tiers to protect the public and workers, respectively.

W e accord great weight to the views of our sister health and safety agencies who have primary responsibility in these areas. Therefore, in developing the new guidelines, FCC staff is considering an approach that, we believe, accommodates all the comments we received and responds to the recommendations made by the EPA and by the other federal health and

safety agencies. Generally, this approach incorporates elements from both ANSI/IEEE and NCRP, and includes: 1) adoption of limits for field strength and power density limits based on NCRP recommendations (the ANSVIBBE and NCRP limits are similar up to 1500 MHz, above which NCRP has different MPE limits); 2) adoption of ANSI/IEEE limits for localized specific absorption rate (SAR) (again, similaT to NCRP); 3) deferring adoption of the ANSI/IEEE radiated power exclusion clause pending possible future consideration of a modified version; 4) a categorical exclusion policy for certain transmitters: and 5) endorsement of measurement procedures described in ANSI/ IEEE C95.3 and NCRP Report No. 119.

Upon completion of your review of this approach, we seek your written comments concerning whether this approach is consistent with your views and adequately addresses your concerns. We will place your letter in the record of the role-making docket.

Under the Telecommunications Act of 1996 the Commission is required to complete action in this proceeding by early August. Therefore, we would appreciate your early consideration of this request. If you or your staff have any questions please contact me at (202) 418-1000 or Dr. Robert Cleveland, of our Office of Engineering and Technology, at (202) 418-2422.

I look forward to your timely response.

Sincerely,

/s/ Read E. Hunt
Read E. Hunt
Chairman

C16

(72)

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

Federal Communications Commission
Office of the Secretary

July 2, 1996

D. Bruce Burlington, M.D.
Director
Center for Devices and Radiological Health
U.S. Food and Drug Administration
Mail Code HFZ-1
5600 Fishers Lane
Rockville, MD 20857

Dear Dr. Burlington:

In 1993, the FCC released a Notice of Proposed Rule Making (NPRM ET Docket 93-62) to update and amend the guidelines we use for evaluating human exposure to environmental RF energy emitted by FCC-regulated transmitters. At that time we requested that the Food and Drug Administration and other federal agencies with responsibilities for health and safety comment on the various issues raised in the NPRM including our proposal to adopt the guidelines developed by the Institute of Electrical and Electronics Engineers. Inc., (IEEE), and later endorsed by the American National Standards Institute (ANSI), designated ANSI/IEEE C95. 1-1992. In response, we received comments from the FDA as well as from other agencies.

The federal health and safety agencies generally expressed support for our efforts to update our RF exposure

guidelines. However, comments from our sister agencies included recommendations for alternatives to our original proposal to adopt the ANSI/IEEE guidelines. For example, the U.S. Environmental Protection Agency recommended that we consider adopting certain features of the ANSI/IEEE guidelines along with others recommended by the National Council on Radiation Protection and Measurements (NCRP). In many ways the ANSI/IEEE and NCRP guidelines are similar. However, as pointed out by the EPA, there are certain significant differences. For example, the EPA expressed its opinion that at microwave frequencies the limits specified by NCRP would be preferable. Likewise, the National Institute of Occupational Safety and Health (NIOSH) believed that it would be more appropriate to use the MPE limits recommended by NCRP, but did support the adoption of the ANSI/IEEE limits on induced RF currents. The Occupational Safety and Health Administration (OSHA) generally supported the ANSI/IEEE standard, but objected to the way it defined the use of two different exposure tiers to protect the public and workers, respectively. The FDA generally supported our adoption of the ANSI/IEEE standard, but expressed significant concern about the radiated power exclusion clause included in the standard.

W e accord great weight to the views of our sister health and safety agencies who have primary responsibility in these areas. Therefore, in developing the new guidelines, FCC staff is considering an approach that, we believe, accommodates all the comments we received and responds to the recommendations made by the FDA and by the other federal health and safety agencies. Generally, this approach incorporates elements from both ANSI/IEEE and NCRP, and includes: 1) adoption of limits for field strength and power density limits based on NCRP recommendations (the ANSVIBBE and NCRP limits are similar up to 1500 MHz, above which NCRP has different MPE limits); 2) adoption of ANSI/IEEE limits for localized specific absorption rate (SAR) (again, similaT to NCRP); 3) deferring adoption of

the ANSI/IEEE radiated power exclusion clause pending possible future consideration of a modified version; 4) a categorical exclusion policy for certain transmitters: and 5) endorsement of measurement procedures described in ANSI/ IEEE C95.3 and NCRP Report No. 119.

Upon completion of your review of this approach, we seek your written comments concerning whether this approach is consistent with your views and adequately addresses your concerns. We will place your letter in the record of the role-making docket.

Under the Telecommunications Act of 1996 the Commission is required to complete action in this proceeding by early August. Therefore, we would appreciate your early consideration of this request. If you or your staff have any questions please contact me at (202) 418-1000 or Dr. Robert Cleveland, of our Office of Engineering and Technology, at (202) 418-2422.

I look forward to your timely response.

Sincerely,

/s/ Richard M. Smith
Richard M. Smith
Chief
Office of Engineering and Technology

Excerpts from Notice FCC 96-326, Report & Order in ET-Docket 93-62, and reported at 11 F.C.C. Rcd. 15123 (1996)

43. Accordingly, "occupational/controlled" exposure, as used by the Commission, will apply to situations in which persons are exposed as a consequence of their employment and in which those persons who are exposed have been made fully aware of the potential for exposure and can exercise control over the their exposure. Occupational/controlled exposure will also apply where exposure is of a transient nature as a result of incidental passage through a location where exposure levels may be above general population/uncontrolled limits (see below), as long as the exposed person has been made fully aware of the potential for exposure and can exercise control over his or her exposure by leaving the area or by some other appropriate means. We will apply the occupational/controlled exposure limits to amateur radio operators and members of their immediate household, as discussed later (see para. 162, infra).

47 CFR 1.1310 NOTE 1 TO TABLE 1: Occupational/ controlled limits apply in situations in which persons are exposed as a consequence of their employment provided those persons are fully aware of the potential for exposure and can exercise control over their exposure. Limits for occupational/ controlled exposure also apply in situations when an individual is transient through a location where occupational/ controlled limits apply provided he or she is made aware of the potential for exposure.

71. Based on the concerns expressed by the FDA, we are not adopting at this time low-power device exclusions based on radiated power, as contained in the 1992 ANSI/ IEEE guidelines. As discussed above, the FDA cites recent studies indicating that cellular telephones and other hand-held transmitters that meet ANSI/IEEE radiated power exclusion limits can exceed the corresponding exclusion limits for SAR. In one of those studies, the highest SAR values were

measured when the antennas and cases of various hand-held cellular telephones were placed in direct contact with a head model, i.e. less than 2.5 cm from the head. Of six telephone models tested in this study under these "worst case" conditions, the highest SAR obtained was approximately 8.8 mW/gram (8.8 W/kg) for 1 watt of output power. This SAR exceeds the recommended limit of 1.6 W/kg for an uncontrolled environment, suggesting that an appropriate radiated power exclusion level for ensuring that the 1.6 W/kg SAR limit could not be exceeded under "worst case" conditions would be on the order of 180 mW at 900 MHz. The ANSI/IEEE low-power device exclusion clause allows for exclusions at a power level of 700 mW at 900 MHz provided a separation of 2.5 cm is maintained between the radiating structure of the device and the body of the user, although, as discussed earlier, comments submitted in this proceeding maintain that the 2.5 cm distance was not meant to apply to the head.

72. This study also reported SAR values measured when the telephones were positioned normally against the head model (i.e., less than 2.5 cm from the head), but with the antenna at various angles and distances from the head. This was referred to as "standard" handling of the telephone. For this "standard" operating situation, the highest SAR measured from the six models tested was approximately 2.8 W/kg for 1 watt of power. This implies that, for the "standard" exposure condition, an appropriate "worst case" radiated power level to meet the 1.6 W/kg SAR limit at 900 MHz should be on the order of about 570 mW, not 700 mW as recommended by the 1992 ANSI/IEEE standard. Similarly, recent data submitted to our laboratory analyzing SAR values for hand-held PCS devices operating near 2 GHz shows that at 125 mW of average power maximum, SAR values (averaged over 1 gram) can, in some cases, be up to 80-90% of the 1.6 W/kg limit. The 1992 ANSI/IEEE radiated power exclusion clause applies only to frequencies up to 1500 MHz. However, if this exclusion were extrapolated to PCS frequencies (1850-1990 MHz), the radiated power exclusion limit would be in the

range of 300-350 mW, more than twice the 125 mW used by the devices tested. Therefore, it would appear that some devices that would qualify for the radiated power exclusion in the 1992 ANSI/IEEE standard might exceed the SAR limit of 1.6 W/kg.

73. As noted by the FDA, these studies raise questions about the accuracy of the low-power device exclusions based on radiated power as contained in the 1992 ANSI/IEEE guidelines. We acknowledge, however, that all of the transmitters in the devices in these studies were placed directly against the head and did not maintain the 2.5 cm separation distance required by ANSI. However, as discussed above, it is unclear whether that separation distance was meant to apply to the head. In light of these outstanding issues and questions, we do not feel that, at this time, it is appropriate for us to adopt the low power exclusion. On the other hand, we also recognize that to require SAR evaluation of every low-power transmitting device subject to Commission authorization would prove to be a costly and unnecessary burden for many manufacturers. Therefore, at this time we will require only routine SAR evaluation for the devices noted above that constitute the classes for which there appears to be the greatest potential for exposure because of their relatively higher duty factors. Based on additional scientific evidence that may be forthcoming, we may consider modifying or expanding this requirement, and we may also consider whether a modified exclusion clause based on radiated power can be adopted.

Notice FCC 96-326, Appendix A: Final Regulatory Flexibility Analysis

4. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:

Other Compliance Requirements

As was true for the previous rules, there are no specific compliance requirements, as such. Under the Commis-

sion's NEPA rules, applicants and licensees are required to submit an Environmental Assessment (EA) if they do not comply with our RF exposure guidelines (47 CFR § 1.1311). An EA is a detailed accounting of the consequences created by a specific action that may have a significant environmental impact, in this case a Commission authorization of a transmitter or facility that exceeds the RF guidelines. An EA would be evaluated by the Commission to determine whether the authorization should be granted in view of the environmental impact. In reality, this leads to a de facto compliance requirement, since most applicants and licensees who are not categorically excluded (see above) undertake measures to ensure compliance before submitting an application in order to avoid the preparation of a costly and time-consuming EA. For this reason EAs are rarely filed with the Commission. This has not changed from the existing rules.

National Radiation Protection and Measurement (NCRP) Report 86: Biological Effects and Exposure Criteria For Radiofrequency Electromagnetic Fields.
Sec. 17.4.3 Time Averaging for the General Population

The time base by which to average the limiting *SAR* for occupational exposure is 0.1 h (6 minutes). For exposure of the general population an averaging period of 0.5 h (30 min) is recommended. The increased stringency of the general-population limit allows this liberalization with no significant additional risk because the population limit, along with the 30-min time-averaging period, restricts the maximal *SA* to the population during the 30-min period to a value of no larger than that experienced during the 6-min time-averaging period of occupational exposure. Overall, the SA for the population remains at one-fifth that of the occupational value. At the same time, the 30-min time-averaging period is responsive to some special circumstances for the public at large. Examples are transient passage by the individual past high-powered RFEM sources, and brief exposure to civil telecommunications systems. [emphasis added]

c24

(80)

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

MAR 20, 1998

Mr. Arthur Firstenberg
P.O. Box 684
Norwich, N.Y. 434-4499

This is in response to your request of March 9, 1998 pursuant to the Freedom of Information Act (the "FOIA"), 5 U.S.C. Sec 552. You request a copy of the draft Report & Order, dated July 2, 1996 in ET Docket No. 93-62 that was coordinated with the Interdepartment Radio Advisory Committee (the "IRAC").

As your letter notes, I recently denied a request for the identical document filed by Mr. James Hobson. You attached a copy of my denial to your request. As I stated in my denial to Mr. Hobson, the draft Report & Order is a predecisional document which is exempt from disclosure pursuant to Exemption 5 of the FOIA, 5 U.S.C. Sec.(b)(5) and Sec.0.457(e) of the Commission's Rules, 47 C.F.R. Sec. 0.457(e). For the reasons set forth in my letter to Mr. Hobson, a copy of which is appended hereto, I am hereby denying your above-referenced request. You may file an application for review of any part of this decision with the Commission's Office of General Counsel within 30 days in accordance with 47 C.F. R. Sec. 0.461(i).

Sincerely;

/s/ Richard M. Smith
Chief
Office of Engineering & Technology

Enclosure

C25

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

MAR 20, 1998

James R. Hobson, Esq.
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Ave – Suite 750
Washington, D.C. 20005

Dear Mr. Hobson,

This is in response to your request of February 11, 1998 pursuant to the Freedom of Information Act (the "FOIA"), 5 U. S.C. Sec. 552. You request copies of the draft Report & Order, dated July 2, 1996 in ET Docket 93-62 that was coordinated with the Interdepartment Radio Advisory Committee (the "IRAC") as well as any transmittal letter or Memorandum from the FCC to IRAC member agencies that summarizes or explains the contents of the draft Report & Order.

The draft Report & Order is a predecisional document which is exempt from disclosure pursuant to Exemption 5 of the FOIA, 5 U.S.C. Sec.(b)(5) and Sec. 0.457(e) of the Commission's Rules, 47 C.F.R. Sec. 0.457(e). It was clearly part of the deliberative process of the agency in that it represents the recommendation of the Office of Engineering & Technology made in consultation with other Commission Bureaus and Offices, to the FCC Commissioners.

Release of the draft document would threaten "the give and take of the deliberative process" see Chemical Manufacturers Ass'n v. Consumer Prod. Safety Comm. 600 F.Supp. 114, 118(D.D.C 1984). The deliberative process aspect of Exemption 5 is rooted in three distinct policy purposes: (1) to en-

courage frank discussion within Government; (2) to prevent public confusion that could result from the disclosure of the internal debate prior to the formulation of agency policies; and (3) to guarantee that the Government will be judged on positions actually adopted rather than on factors considered in reaching such positions. Jordan v. Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc). The concerns underlying Exemption 5 are directly applicable to the instant case.

Nor does the fact that the draft Report & Order was circulated to the IRAC alter the privileged nature of the document. The draft Report & Order was circulated to the IRAC as part of the normal IRAC review process applicable to decisions which could have an impact on other federal agencies. It was apparently submitted to the IRAC without any cover letter or other transmittal memorandum. All comments received were, if written, placed in the docket of the proceeding and, if oral, were summarized, and summaries thereof were placed in the docket file.

Exemption 5 and Sec. 0.457(e) clearly protect interagency documents as well as intra-agency documents. Indeed, it would undermine the purpose behind the exemption if a document which would, in absence of disclosure to other agencies pursuant to the IRAC process, be a privileged intra-agency document, were to lose its privilege merely because the IRAC process required it to be circulated to other Federal agencies. Disclosure of the document in question would reveal aspects of the Commission's as well as of the Government's deliberative process by providing a meaningful glimpse into the thoughts of agency personnel involved in the creation thereof. Thus, the document falls within the Exemption 5 of the FOIA.

Your letter states that documents which would ordinarily be privileged pursuant to Exemption 5 "lose the protection if an agency, in the making of a final decision, chooses expressly to adopt them or incorporate them by reference." The docu-

ment in question is a draft document; neither it nor the final version of the Report & Order reflect any information not contained in the public record. The Report & Order that was eventually adopted may differ in some respects from the document in question because it incorporated comments received from the Commissioners as well as staff of this agency and the staffs of some of the other agencies which received the draft pursuant to the IRAC consultative process. It does not adopt or incorporate by reference any documents received from those agencies. Consequently, I do not believe the line of cases you cite in this regard is apposit.

For the aforementioned reasons, I am hereby denying your above request. You may file an application for review of any part of this initial decision which you find unsatisfactory with the Commission's Office of General Counsel within 30 days in accordance with 47 C.F.R. Sec. 0.46(I).

Sincerely,

/s/ Richard M. Smith
Richard M. Smith
Chief
Office of Engineering & Technology

Footnote #1 from Notice FCC 96-326, Report & Order in ET-Docket 93-62, and reported at 11 F.C.C. Rcd. 15123 (1996).

Specifically, we are adopting limits for field strength and power density that are generally based on Sections 17.4.1 and 17.4.2, and the time-averaging provisions recommended in Sections 17.4.1.1 and 17.4.3, of "Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields," NCRP Report No. 86 (1986), National Council on Radiation Protection and Measurements (NCRP). With the exception of the limits on exposure to power density above 1500 MHz and the limits for exposure to lower frequency magnetic fields, these MPE limits are also generally based on the guidelines contained in the RF safety standard developed by the Institute of Electrical and Electronic Engineers, Inc. (IEEE) and adopted by the American National Standards Institute (ANSI). See Section 4.1 of ANSI/IEEE C95.1-1992, "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz".

Supreme Court, U.S.
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Nos. 00-393, 00-407, 00-417 and 00-427

In the Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, ET. AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

DAVID FICHTENBERG, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

MICHAEL WORSHAM, PETITIONER

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CELLULAR PHONE TASKFORCE, PETITIONER

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FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. 332(c)(7)(B)(iv) (Supp. IV 1998), which preempts state and local zoning authorities from regulating the "environmental effects" of personal wireless telecommunications facilities, includes preemption of state and local regulation of the human health effects of such facilities.

2. Whether the preemptive effect of 47 U.S.C. 332(c)(7)(B)(iv) (Supp. IV 1998) violates the Tenth Amendment.

3. Whether the court of appeals correctly found that the Federal Communications Commission was not required to prepare an Environmental Impact Statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, when it promulgated rules implementing the provisions of that Act.

4. Whether Congress's delegation of authority to the FCC to promulgate rules governing the environmental effects of radiofrequency radiation violated the "nondelegation" doctrine.

5. Whether the court of appeals correctly found that the FCC was not required to solicit the comments of other agencies on record material newly submitted to the FCC during a reconsideration of its initial order promulgating rules governing the environmental effects of radiofrequency radiation.

6. Whether the court of appeals correctly held that the FCC's rules governing the environmental effects of radiofrequency radiation did not violate the Rehabilitation Act of 1973, 29 U.S.C. 794.

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In the Supreme Court of the United States

No. 00-393

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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DAVID FICHTENBERG, PETITIONER

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22[1]) is reported at 205 F.3d 82.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2000. Petitions for rehearing were denied on June 6, 2000 (Pet. App. A23-A25) and June 15, 2000 (Pet. App. A26-A27). The petition for a writ of certiorari in No. 00-393 was filed on September 8, 2000. The petitions in Nos. 00-407, 00-417 and 00-427 were filed on September 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA), requires that in connection with "major Federal actions significantly affecting the quality of the human environment," federal agencies prepare an "environmental impact" statement (EIS) that assesses the environmental effects of a proposed project. 42 U.S.C. 4332(2)(C). Not all activities, however, are "major" actions requiring such an analysis. Under rules established by the Council on Environmental Quality (CEQ), the agency that administers NEPA, some projects require only an "environmental assessment" (EA), which may be followed by a "finding of no significant impact" (FONSI). 40 C.F.R. 1508.9, 1508.13. Other actions may be "categorically excluded" from environmental analysis. 40 C.F.R. 1508.4. Determining which level of environmental scrutiny to apply to specific categories of activities is largely left to the

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[1] Citations to "Pet. App." refer to the appendix to the petition in No. 00-393.

individual agencies. An agency must, however, define three "classes of action": those that "normally do require environmental impact statements," those that "normally do not require" any environmental evaluation, and those that "normally require environmental assessments but not necessarily environmental impact statements." 40 C.F.R. 1507.3(b)(2).

2. a. All types of wireless communications, including television, radio, cellular telephones, pagers, and similar devices, work by sending and receiving electromagnetic signals. The energy fields generated by the transmitters of radio signals, referred to as radiofrequency or RF radiation, can affect the environment. Specifically, high levels of RF energy can cause the heating of human tissue, known as a "thermal" effect.[2] In 1985, the Federal Communications Commission (FCC) implemented, pursuant to NEPA and directives issued by the CEQ, rules that specified the emission levels above which human exposure to RF energy caused by FCC-licensed transmitters would require environmental analysis under NEPA. *Biological Effects of Radiofrequency Radiation*, 100 F.C.C. 2d 543 (1985).

The exposure limits were based on RF safety standards that had been adopted in 1982 by the American

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[2] Microwave ovens work by virtue of the thermal effect of extremely high levels of RF energy. See Office of Engineering and Technology, FCC, *Questions and Answers About Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields*, OET Bulletin 56, at 6 (4th ed. 1999). The FCC exposure limit for the general public is one-fiftieth of the point at which RF energy begins to cause any unhealthful thermal effect. See National Council on Radiation Protection and Measurements, *Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields*, NCRP Report No. 86, at 279-283 (1986) (reprinted at C.A. App. 305-307).

National Standards Institute (ANSI), a recognized standard-setting organization. 100 F.C.C. 2d at 551. ANSI established recommended levels of "maximum permissible exposure" or "MPE" for various radio frequencies, since various frequencies cause a thermal effect at different rates. Transmitting facilities that would not lead to human exposure above the limits were considered to have no adverse effect and required no environmental evaluation; preparation of an EA or an EIS was required for transmitters that could cause human exposure above the limits. *Id.* at 561.

In 1992, ANSI issued new RF exposure standards. At about the same time, other organizations such as the congressionally chartered National Council on Radiation Protection and Measurements (NCRP) also issued RF protection standards. The following year, the FCC began a rulemaking proceeding to determine whether it should adopt one of the new standards to replace the 1982 ANSI standards. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Notice of Proposed Rule Making,* 8 F.C.C.R. 2849 (1993) (*RF Notice*).

In the course of the rulemaking proceeding, the Commission received more than one hundred comments representing a broad range of interests. The Commission's staff also consulted with and/or received comments from a number of federal agencies that are responsible for the environment, human health and worker safety: the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), the Food and Drug Administration (FDA), and the National Institute for Occupational Safety and Health (NIOSH). *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Report and Order,* 11 F.C.C.R.

15,123, 15,129-15,131 (1996) (*RF Order*). When it made its ultimate decision, the FCC gave particular deference to the views of those agencies, which are "expert agencies with respect to determining appropriate levels of safe exposure to RF energy." *Id.* at 15,135. In accordance with the suggestions of the federal environmental and health agencies, the Commission ultimately adopted new guidelines based primarily on the RF exposure limits suggested by the NCRP. *Ibid.*

Under the new RF safety rules, as under the old ones, licensees generally must determine whether their transmitters will cause human exposure above the MPE limits. If so, an EA, and possibly an EIS, must be prepared and the Commission will then determine whether to allow transmission to occur.[3] No further environmental analysis is required for transmitters that will not lead to exposures greater than the limits. 47 C.F.R. 1.1307(b). Certain RF transmitters that operate at low power levels or in inaccessible locations and are thus extremely unlikely to cause exposure above the limits are categorically excluded from having to perform the initial assessment of RF exposure. 47 C.F.R. 1.1307(b); see also 40 C.F.R. 1507.3(b) (allowing agencies to create categorical exclusions). On petitions for reconsideration, the Commission reaffirmed the fundamentals of its initial decision. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Second Memorandum Opinion and Order*, 12 F.C.C.R. 13,494 (1997) (*RF Reconsideration Order*).

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[3] As a practical matter, the FCC's experience is that licensees almost always ensure that their facilities will not cause excess exposure, and environmental analysis is rarely conducted.

b. Shortly before the Commission issued the *RF Order*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, became law. Section 704(a) of that Act, entitled "National Wireless Telecommunications Siting Policy," added a new provision to the Communications Act of 1934, 47 U.S.C. 332(c)(7)(B)(iv),[4] which provides in pertinent part that "[n]o State or local government * * * may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." *Ibid.* In Section 704(b) of the Telecommunications Act Congress also directed that "[w]ithin 180 days * * * the Commission shall complete action in [the RF radiation rulemaking] to prescribe and make effective rules regarding the environmental effects of radio frequency emissions."[5]

The House Commerce Committee, which drafted the preemption provision, explained that the reason for the prohibition was that "siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of" advanced telecommunications services. H.R. Rep. No. 204, 104th Cong., 1st Sess. 94-95 (1995). The Committee explained that "local zoning decisions, while responsive

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[4] All citations in this brief to 47 U.S.C. 332(c)(7) refer to Supp. IV 1998.

[5] Congress also directed, in a provision not challenged by petitioners in this Court, that state and local zoning authorities act within a "reasonable period of time" after the filing of a request to build a communications tower and that denials of such requests "be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. 332(c)(7)(B)(ii) and (iii).

to local concern about the potential effects of radio frequency emission levels, are at times not supported by scientific and medical evidence." *Ibid.* In the *RF Order*, the Commission implemented the preemption provisions by adding Section 1.1307(e) to its rules, the language of which tracks the statute. 47 C.F.R. 1.1307(e).

c. In February 1997, the Cellular Telephone Taskforce submitted to the Commission a "complaint" claiming that the RF rules discriminate against persons who are hypersensitive to electromagnetic fields and thereby violate the Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. IV 1998). The Chief of the Office of Engineering and Technology, acting under delegated authority, ultimately dismissed the complaint because it addressed the activities of FCC licensees, not those of the agency itself. Letter from Richard M. Smith, Chief, OET, to Arthur Firstenberg, President, Cellular Phone Taskforce (Feb. 2, 1998) (C.A. App. 6119-6121). The FCC's rules implementing the Rehabilitation Act expressly do not apply to the "programs or activities of entities that are licensed or certified by the Commission." 47 C.F.R. 1.1830(b)(6).

3. a. The court of appeals affirmed the the Commission's orders. Pet. App. A1-A22. The court rejected the claim that the Commission had failed to take into account whether RF energy had deleterious nonthermal effects, finding that there was "room for disagreement * * * among experts in the field" regarding whether such effects existed and that "the FCC was justified in continuing to rely on the ANSI and NCRP standards." *Id.* at A10. The court held that the FCC had committed no error by not supplying the EPA and other agencies with publicly available studies that had been submitted to the FCC during the recon-

sideration proceeding. The FCC "could reasonably expect those agencies to keep abreast of scientific developments" and to "monitor all relevant scientific input" into the FCC's decision. *Ibid.*

The court rejected the claim that the FCC had violated NEPA because it did not prepare an EIS in connection with the rules. "[W]here an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient." Pet. App. A17 (quoting *Environmental Defense Fund* v. *EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973)). The court found that the FCC's orders "functionally satisf[ied] the CEQ's requirements for an EA and a FONSI." Pet. App. A17-A18.

The Court upheld the Commission's finding that, although 47 U.S.C. 332(c)(7)(B)(iv) precluded state and local governments from regulating the "placement, construction, and modification" of personal wireless service facilities "on the basis of the environmental effects of radio frequency emissions," that provision applied also to the operation of such facilities. The court noted that under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deference must be accorded to the FCC's interpretation of the statute. Pet. App. A20. The court also noted that the savings provision of subsection (A) of the same statute provided only that the FCC may not "limit or affect the authority of a State or local government" over "the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). Since "[s]ubsection (A) does not * * * preserve [state and local governments'] authority to regulate such facilities'

operations * * * the absence of the word 'operation' from the subsequent limitation on their authority under subsection (B)(iv) does not grant such power." Pet. App. A20.

The court rejected the claim that the preemption provision violates the Tenth Amendment. "The statute does not commandeer local authorities to administer a federal program," the court found, because "State and local governments are not required to approve or prohibit anything. The only onus placed on state and local governments * * * is that they may not regulate personal wireless service facilities that conform to the FCC Guidelines on the basis of environmental effects of RF radiation." Pet. App. A21. Straightforward preemption of that sort, the court found, does not violate the Tenth Amendment.

b. In its initial opinion, the court dismissed claims raised under the Rehabilitation Act and the Americans with Disabilities Act of 1990, 42 U.S.C. 1201 *et seq.* (ADA). Similar claims made before the agency had been resolved by the staff rather than the Commission itself, the court found, and therefore had not been the subject of a final, appealable agency order. Pet. App. A6. Pursuant to a petition for rehearing, the panel decided to address the merits of the claims notwithstanding their lack of finality. The ADA claim failed, the court found, because the relevant part of the ADA does not apply to the federal government. *Id.* at A25. The claim under the Rehabilitation Act lacks merit because that Act applies only to "the discriminatory denial of the benefits of a [federal] 'program or activity,'" and the construction of RF transmitters is not a program or activity of the FCC. *Ibid.*

ARGUMENT

Four parties, Citizens for the Appropriate Placement of Telecommunications Facilities (CAPTF), Cellular Phone Taskforce (CPT), Michael C. Worsham (Worsham) and David Fichtenberg (Fichtenberg), petition for a writ of certiorari. None of the petitions raises any issue that warrants this Court's review.

1. Petitioners Worsham and Fichtenberg claim that the Second Circuit has impermissibly interpreted 47 U.S.C. 332(c)(7)(B)(iv). That statute preempts state and local zoning authorities from regulating the "environmental effects" of personal wireless service facilities as long as the transmitter complies with the FCC's RF exposure standards. Petitioners contend (Worsham Pet. 10-14; Fichtenberg Pet. 32-35) that the court of appeals erroneously interpreted the term "environmental effects" to mean "human health effects." That claim is incorrect.

At the outset, the court below did not address the issue. The court stated in passing (Pet. App. A5) in the background section of its opinion that the preemption provision included human health considerations, but the court did not consider the question in its legal discussion and did not provide any analysis of it. For that reason alone, this case is unsuited for further review.

Moreover, the court of appeals' apparent understanding of the statute was correct and not in conflict with any decision of this Court or another court of appeals. When it enacted Section 332(c)(7)(B)(iv), Congress was clearly concerned with the biological effects of RF energy fields. The statute preempts only "to the extent that such facilities comply with the Commission's regulations concerning [RF] emissions." A tandem provision, Section 704(b) of the Telecom-

munications Act, gave the FCC 180 days to "complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." Both the rulemaking proceeding and the FCC regulations to which Congress referred concerned almost exclusively the biological effects of RF energy. The original 1982 ANSI exposure standards that the FCC adopted in 1985 were based on the absorption of RF energy by the human body and the thermal effects in the human body of various levels of RF exposure. The 1992 ANSI standard, which the Commission proposed to adopt in ET Docket 93-62, see *RF Notice*, *supra*, likewise had to do entirely with human biological effects of RF fields. The statutory preemption of state and local consideration of environmental effects of RF to the degree that a transmitter complied with the FCC's rules thus necessarily was intended to include state and local consideration of biological effects.[6]

Petitioners mistakenly rely on a general presumption that ambiguous statutes should not be interpreted to preempt state law concerning health and safety. Worsham Pet. 9; Fichtenberg Pet. 33-34. That presumption does not apply where, as here, Congress's intent to preempt local consideration of biological effects is "clearly indicated by those considerations which are persuasive of the statutory purpose." *Maurer* v. *Hamilton*, 309 U.S. 598, 614 (1940). That

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[6] The House Report discussing Section 704 of the Telecommunications Act further confirms that conclusion. The Report expressed Congress's concern that state and local authorities had interfered with the nationwide deployment of wireless communications systems for reasons that were "at times not supported by scientific *and medical* evidence." H.R. Rep. No. 204, *supra*, at 95 (emphasis added).

standard is amply satisfied by the statutory and administrative context of Section 332(c)(7)(B)(iv) as well as its legislative history. That Congress may have distinguished health effects from environmental effects (Worsham Pet. 13-14) in other statutes addressing different problems is of no moment in the face of Congress's evident intent here.

As petitioner Worsham notes, "[t]wo federal courts have essentially agreed with the Court of Appeals in the instant case." Pet. 12 (citing *AT&T Wireless PCS, Inc.* v. *City Council of Va. Beach*, 155 F.3d 423, 431 n.6 (4th Cir. 1988), and *Primeco Personal Communications* v. *Village of Fox Lake*, 35 F. Supp. 2d 643, 645 (N.D. Ill. 1999)). Petitioner Worsham asserts (Pet. 10), however, that the decision of the court of appeals "is arguably inconsistent with" the decision of the Second Circuit in *Freeman* v. *Burlington Broadcasters, Inc.*, 204 F.3d 311, cert. denied, 121 S. Ct. 276 (2000). The cited passage from *Freeman* states that the term "environmental effects" is not defined in the statute and that it "focus[es] on degradation of the natural environment, effects on historical landmarks, *and the biological effects of RF radiation.*" *Id.* at 325 (emphasis added). Accordingly, *Freeman* is entirely consistent with the Second Circuit's holding in this case that the term "environmental effects" includes human health considerations. In any event, further review would not be warranted to resolve an intra-circuit discrepancy.

2. Petitioners CAPTF and Fichtenberg contend (CAPTF Pet. 14-21; Fichtenberg Pet. 35-38) that the preemptive effect of 47 U.S.C. 332(c)(7)(B)(iv) violates the Tenth Amendment. They claim that Congress has impermissibly commandeered the government apparatus of the states. The court of appeals correctly

rejected that claim, and its decision does not conflict with that of any other court of appeals or of this Court.[7]

Congress commandeers the legislative process of States "by directly compelling them to enact and enforce a federal regulatory program." *New York* v. *United States*, 505 U.S. 144, 161 (1992). In *New York*, the Court struck down Congress's requirement that the States either regulate radioactive waste under federal guidelines or take title to and dispose of the waste themselves. *Id.* at 174-175. Having no choice other than one of the two courses set forth by Congress, the States were thus pressed involuntarily into "the service of federal regulatory purposes." *Id.* at 175. Likewise, in *Printz* v. *United States*, 521 U.S. 898 (1997), the Court invalidated a federal statute that required local law enforcement officials to conduct background checks

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[7] There is a question whether petitioners have standing to present their claim. It is our position that individuals not acting in their official capacity generally lack standing to raise a Tenth Amendment claim, since they cannot establish that any personal injury would be redressed by a favorable decision, and the rights they advance in the litigation are rights of third parties. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Warth* v. *Seldin*, 422 U.S. 490 (1975); but cf. *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 700-703 (7th Cir. 1999) (discussing authorities and finding standing to raise Tenth Amendment claim), cert. denied, 120 S. Ct. 934 (2000). In the court of appeals, some individuals identified as state or local government officials were among the parties. See CAPTF Pet. ii-iii. Two of them (Holly A. Fournier and Jeannine Karlsson, see CAPTF Pet. ii) are listed as petitioners before this Court, although it is not clear whether they are acting in their official capacities and whether they are asserting in this litigation rights they hold by virtue of their official capacities. In addition, individual members of a collective governmental body ordinarily do not have standing to assert the rights of the body as a whole. See *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986).

of gun purchasers. That requirement, the Court held, "compel[led] the States to enact or administer a federal regulatory program." *Id.* at 933 (quoting *New York* v. *United States*, 505 U.S. at 188).

Section 332(c)(7)(B)(iv) does not commandeer the processes of state and local zoning authorities because it does not compel those bodies to do anything at all. Rather, the statute simply limits the factors state and local zoning authorities may consider in the exercise of their ordinary zoning functions. Those authorities may not deny a permit "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. 332(c)(7)(B)(iv). They are permitted to grant or deny permits on any other basis. Indeed, Congress expressly provided that with the exception of RF and a few other matters not before the Court, "nothing * * * shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). That proviso leaves intact all other traditional bases for land use decisions, such as aesthetics or neighborhood character, or other local zoning laws. Local authorities throughout the country have successfully rejected tower siting proposals on such grounds. See, *e.g.*, *Sprint Spectrum, L.P.* v. *Willoth*, 176 F.3d 630 (2d Cir. 1999); *Aegerter* v. *City of Delafield*, 174 F.3d 886 (7th Cir. 1999); *AT&T Wireless PCS, Inc.* v. *Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307 (4th Cir. 1999); *AT&T* v. *City Council of Va. Beach*, *supra*.

This case thus falls squarely within the principle that federal law may "displace state regulation" even though

this serves to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981). Indeed, this Court "long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Id.* at 291; see also *Testa* v. *Katt*, 330 U.S. 386 (1947). The court below thus properly held (Pet. App. A21) that "State and local governments are not required to approve or prohibit anything" and correctly rejected petitioners' Tenth Amendment claims.

Petitioner CAPTF contends (Pet. 16) that the decision below conflicts with the decision of the Fourth Circuit in *Petersburg Cellular Partnership* v. *Board of Supervisors*, 205 F.3d 688 (2000) (per curiam). In that case, the Fourth Circuit upheld a county's decision to permit a communications tower to be built, but there was no agreement on a single rationale. Only a single judge, Judge Niemeyer, would have upheld the county's decision on the ground that certain federal limitations on the county's decision violated the Tenth Amendment. See *id.* at 691; *id.* at 696-705 (opinion of Niemeyer, J.).[8] Accordingly, the Fourth Circuit did not take a position regarding the Tenth Amendment issue

[8] The other judge voting to uphold the county's decision based his determination on the ground that the county's decision did not violate any provision of the Telecommunications Act. 205 F.3d at 706-710 (opinion of Widener, J.). The third judge dissented from the court's disposition, on the ground that the county's decision did violate a provision of the Act and that that provision did not violate the Tenth Amendment. *Id.* at 710-720 (opinion of King, J.).

in that case, and the Fourth Circuit's decision in that case therefore does not conflict with the decision of the Second Circuit here.[9]

Also without merit is the claim of CAPTF (Pet. 21) that the decision below conflicts with *Alden* v. *Maine*, 527 U.S. 706 (1999), because, in petitioner's view (Pet. 22), the federal government has allegedly "defaulted on its obligation to protect public health," and it therefore "may not simultaneously *prevent the States from taking action to do so.*" The proposition on which petitioner relies—that federal courts must analyze whether a federal law adequately protects the public health before permitting it to preempt state law—has nothing to do with the Court's decision in *Alden*, which addressed Congress's power to authorize lawsuits against a State in its own courts under federal law.[10] In any event, the court below correctly found that the FCC's RF exposure standards, which were formulated by expert scientific groups that reviewed exhaustive studies and were supported by every federal health and safety

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[9] In any event, even the position urged by Judge Niemeyer in his concurring opinion in *Petersburg Cellular* does not conflict with the decision of the court below in this case. Judge Niemeyer's opinion expressed his belief that 47 U.S.C. 332(c)(7)(B)(iii), which requires a state or local decision regarding the placement of cellular towers to be "in writing and supported by substantial evidence contained in a written record," 47 U.S.C. 332(c)(7)(B)(iii), violates the Tenth Amendment. He appears to have accepted that the provision at issue here—47 U.S.C. 332(c)(7)(B)(iv)—is constitutional. 205 F.3d at 703-704.

[10] Insofar as petitioner's real claim has to do with Congress's spending priorities, see CAPTF Pet. 24-28, petitioner has no standing to air generalized grievances about those priorities. See *Schlesinger* v. *Reservists Comm. To Stop the War*, 418 U.S. 208 (1974).

agency, provide adequate protection to the public. Pet. App. A9.

3. The court of appeals found that the FCC was not required to prepare an environmental impact statement because the rulemaking process, which extensively considered the environmental effects of RF energy, amounted to "functional compliance" with NEPA; the rulemaking was, the court held, equivalent to an EA and a FONSI. Pet. App. A17-A18. Petitioner Cellular Phone Taskforce contends (Pet. 9-12) that the decision conflicts with decisions of other courts holding that the functional compliance test may lawfully be applied only to actions of the EPA and not to the actions of other federal agencies.

Petitioner's claim is incorrect. No federal regulation, statute, or other source of law prohibits the application of the functional compliance test to agencies other than EPA. The cases cited by petitioner either declined to apply the test to a particular agency or stated in dictum that the test applied only to EPA. None of them held that the test could not be applied in any circumstances to any other agency. There is thus no conflict.

As a matter of policy, the Executive Branch believes that the functional compliance test should not be applied to agencies other than EPA, and the government therefore does not ordinarily argue that environmental analyses conducted by agencies other than EPA functionally comply with NEPA. Because that policy has not been expressed in any formal manner, such as regulation or other publication, the Second Circuit did not commit legal error when it found that the FCC had functionally complied with NEPA. Moreover, in light of the extensive scientific analysis performed by the standard-setting organizations that crafted the FCC's guidelines (as well as the commentary received by the

FCC from pertinent federal agencies, including EPA), the finding below that the FCC had functionally complied with NEPA was supported by the record. Further review of the court of appeals' application in this case of the "functional compliance" test is accordingly not warranted.

In any event, the Second Circuit's judgment was correct for a reason other than the one on which it relied. The court's reasoning on this point implicitly assumes that some kind of environmental analysis was required. We argued before the court of appeals, however, that an agency's promulgation of rules that themselves implement NEPA and determine when an EIS is required, is not subject to the preparation of an EIS. The Seventh Circuit adopted that position in *Heartwood, Inc.* v. *United States Forest Service*, 230 F.3d 947 (2000).

As CEQ has interpreted and implemented NEPA, each federal agency specifies which of its actions will be subject to environmental analysis. 40 C.F.R.1507.3. Under the CEQ's approach, which is "entitled to substantial deference," *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979), an agency's regulations to determine when to prepare an EIS are not themselves subject to the EIS requirement. Rather, such rules are "more like an implementing procedure than a federal action of the type contemplated in 42 U.S.C. § 4332(2)(C)," and the categories specified by the rules "are not proposed actions, [but] categories of actions for which an EA or EIS has been deemed unnecessary." *Heartwood*, 230 F.3d at 953. The rules do not "authoriz[e] any activity or commi[t] any resources to a project that might impact the environment." *Id.* at 954. Accordingly, rules such as the FCC's rules in this case implementing

NEPA are not subject to the requirement that what might be termed a "meta-EIS" must be prepared.

4. Petitioners Worsham, Cellular Phone Taskforce and Fichtenberg contend that Congress impermissibly delegated to the FCC the authority to promulgate the RF exposure rules. Worsham Pet. 14-16; CPT Pet. 18-22; Fichtenberg Pet. 31-32. They claim that Congress articulated no "intelligible principle" to guide the FCC's determination of the issue. The court below did not address that issue, and on that ground further review is therefore not warranted.

In any event, the FCC's authority to promulgate the RF regulations does not violate the Constitution. Congress may delegate its legislative functions to agencies "under broad general directives." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). In delegating its authority, Congress must only "lay down * * * an intelligible principle to which the [agency] is directed to conform" in order for the delegation to be constitutional. *Ibid.* (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928)).

Petitioners claim that the only congressional delegation of authority to the FCC to craft the RF rules is contained in Section 704(b) of the Telecommunications Act, which states that "[w]ithin 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." That delegation, they assert, provides constitutionally insufficient guidance.

Petitioners' argument rests on a fundamentally mistaken premise. Section 704 was not the source of the FCC's authority to act in this case, but is instead simply a congressional requirement that the FCC timely resolve an ongoing rulemaking. Indeed, the FCC first

implemented RF rules in 1985, and it began the rulemaking under review three years before the passage of the Telecommunications Act. The agency thus acted under its broad authority to regulate communications conveyed by the Communications Act of 1934.

The FCC issues licenses to use the electromagnetic spectrum pursuant to 47 U.S.C. 307(a), which accords the agency authority to grant licenses "if public convenience, interest, or necessity will be served thereby." Accord 47 U.S.C. 309(a). The public interest standard continues to be the touchstone of FCC regulation. In connection with its licensing function, Congress has granted the FCC the power to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions" of the Communications Act. 47 U.S.C. 303(r); accord 47 U.S.C. 154(i); 47 U.S.C. 303(f) (1994 & Supp. IV 1998). The Commission also has direct authority to "determine the power which each station shall use," 47 U.S.C. 303(c) and to "[r]egulate the kind of apparatus to be used with respect to its external effects," 47 U.S.C. 303(e). This Court long ago held Congress's expansive delegation of authority to the agency to be constitutional. *National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943). The Court ruled that the "public interest" standard was "as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Id.* at 216 (quoting *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)). Those cases foreclose petitioners' delegation argument.[11]

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[11] Petitioners CPT and Worsham appear to claim (CPT Pet. 20-21; Worsham Pet. 16) that the decision below conflicts with *American Trucking Ass'ns, Inc.* v. *EPA*, 175 F.3d 1027 (D.C. Cir. 1999),

Petitioner Worsham further asserts (Pet. 14-15) that it violated the delegation doctrine to give the FCC authority to establish standards in a health and safety field in which the agency acknowledged it lacked expertise. That argument is mistaken.

The RF exposure rules govern the activities of entities that are licensed and heavily regulated by the FCC. Congress has charged the FCC with "mak[ing] available * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communications service," 47 U.S.C. 151 (1994 & Supp. IV 1998), has declared it "the policy of the United States to encourage the provision of new technologies and services to the public," 47 U.S.C. 157(a), and has established procedures to ensure the "efficient and intensive use of the electromagnetic spectrum," 47 U.S.C. 309(j)(3)(D) (Supp. IV 1998). There is a trade-off between those goals and public exposure to RF energy: all risk from RF energy could be eliminated by prohibiting wireless communications technologies. Congress has entrusted to the FCC the process of striking the appropriate balance, a subject squarely within the agency's expertise.

To be sure, the Commission stated that it "does not have the expertise to make independent judgments on such alleged health effects as 'electrosensitivity' or other reported effects on human health. This is the responsibility of the federal health and safety agencies."

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cert. granted, 120 S. Ct. 2003 (No. 99-1257) and 120 S. Ct. 2193 (No. 99-1426). Those cases involve a substantially different regulatory scheme than does this case, and the resolution of those cases is unlikely to affect the settled analysis of the Communications Act delegation of authority to the FCC, as directly upheld by this Court in cases such as *National Broadcasting Co.* and *Pottsville Broadcasting Co.*

RF Reconsideration Order, 12 F.C.C.R. at 13,538. As the agency acknowledged when it first implemented RF exposure rules, it lacks expertise to "*develop* our own radiation exposure guidelines," but "does have the expertise and authority to *recognize* technically sound standards promulgated by reputable and competent organizations such as ANSI." 100 F.C.C. 2d at 551. Moreover, the FCC consulted extensively with EPA, FDA, OSHA and other federal health and safety agencies, all of which concurred in the final standard. *RF Order*, 11 F.C.C.R. at 15,129-15,131; *RF Reconsideration Order*, 12 F.C.C.R. at 13,538. EPA in particular had been working on its own set of RF exposure rules and it had extensive familiarity with the scientific and medical literature. Pet. App. A10. In short, the RF regulations culminated from a multi-disciplinary, multi-agency effort in which the FCC took the lead. There was no constitutional infirmity in that process.

5. Petitioner Cellular Phone Taskforce claims (Pet. 12-15) that the court below erred in finding that the FCC did not violate the Administrative Procedure Act. CPT argues that during the reconsideration proceeding the FCC was required to solicit the comments of the health and safety agencies on new record material concerning "non-thermal" effects. The court of appeals properly rejected that claim of error.

By the time of its first order, the FCC had already consulted extensively with all of the federal health and safety agencies; the discussions included possible non-thermal effects of RF energy. See Pet. App. A7-A16. Moreover, ANSI and NCRP had reviewed extensive scientific literature on non-thermal effects and found such phenomena not to be supported by the evidence. *Id.* at A9. As the FCC found, no further consultation

was needed: "we have considered carefully well over 150 sets of comments filed in this proceeding and have already consulted extensively with all of the relevant health and safety agencies." *RF Reconsideration Order*, 12 F.C.C.R. at 13,506. As found in an analogous context, "[i]t is not enough that the [new] information may be worthy of further inquiry or may be considered important research. [The question is] whether or not the new information presents a seriously different picture" than that originally envisioned. *Wisconsin* v. *Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984). The court of appeals correctly concluded that "it was reasonable for the FCC to continue to rely on the ANSI and NCRP standards absent new evidence indicating that the fundamental scientific understanding underlying the ANSI and NCRP standards was no longer valid." Pet. App. A9-A10.[12]

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[12] Petitioner CPT claims (Pet. 15) that it was arbitrary for the FCC to have "eschewed serious health-agency evaluation * * * while simultaneously disclaiming its own expertise." The court below found that the FCC "could reasonably expect [the health and safety] agencies to keep abreast of scientific developments" and "expect the agency with primacy in evaluating environmental impacts to monitor all relevant scientific input into the FCC's reconsideration." Pet. App. A10. Petitioner does not challenge that finding. Indeed, in a letter which we provided to the court of appeals pursuant to Federal Rule of Appellate Procedure 28(j), EPA recently informed the agency that "[t]he information base on non-thermal effects has not changed significantly since the EPA's original comments in 1993 and 1996. * * * The majority of currently available studies suggests * * * that there are no significant non-thermal human health hazards. It therefore continues to be EPA's view that the FCC exposure guidelines adequately protect the public from all scientifically established harms that may result from RF energy fields generated by FCC licensees." Letter from Robert Brenner, Acting Deputy Assistant

Petitioner Fichtenberg raises the additional administrative law claim that the FCC without explanation switched from an earlier RF exposure standard that required exposure to be "as low as reasonably achievable" (ALARA) to the current standards. Fichtenberg Pet. 28-31. Contrary to petitioner's assertion (Pet. 28), ALARA was never the standard; rather petitioner urged that the agency make it the standard.[13] The FCC explained that a very low standard would not strike a proper "balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." *RF Reconsideration Order*, 12 F.C.C.R. at 13,496. The court below affirmed that finding (Pet. App. A11-A12), and there is no cause to question that conclusion.

6. Finally, petitioner CPT's claim (Pet. 23-25) that the court of appeals improperly rejected its claim under the Rehabilitation Act lacks merit. The argument is that the decision below conflicts with decisions of other courts of appeals that local zoning is a "program or activity" of the relevant governmental unit.

The Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. IV 1998), bars discrimination against or denial of benefits to an "otherwise qualified individual with a disability" on the basis of the handicap "under any

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Administrator for Air and Radiation to Dale Hatfield, Chief, FCC Office of Engineering and Technology (Apr. 30, 1999).

[13] The requirement of 47 U.S.C. 324 that transmitters "use the minimum amount of power necessary to carry out the communication desired" pertains to interference between stations, not potential health effects of RF fields, which were unknown in 1934 when Section 324 was enacted.

program or activity conducted by any Executive agency." Petitioner claimed below that the proliferation of transmitters was causing discrimination against persons especially sensitive to RF fields. The court of appeals held that "CPT does not allege that electrically sensitive people are being denied the benefit of, or are subject to discrimination under, any 'program or activity' of the FCC," and it dismissed the charge. Pet. App. A25.

That holding was correct. The FCC's regulations implementing the Rehabilitation Act expressly state that the rules do not apply to the "programs or activities of entities that are licensed or certified by the Commission." 47 C.F.R. 1.1830(b)(6). Both this Court and the D.C. Circuit have affirmed that approach. *Community Television of S. Cal.* v. *Gottfried*, 459 U.S. 498 (1983); *California Ass'n of the Physically Handicapped, Inc.* v. *FCC*, 840 F.2d 88 (D.C. Cir. 1988).

That reasoning defeats petitioner's contention that the Second Circuit's judgment conflicts with the decision of the Ninth Circuit in *Bay Area Addiction Research & Treatment, Inc.* v. *City of Antioch*, 179 F.3d 725 (1999). That case applied the Rehabilitation Act to the zoning activities of a governmental unit. The FCC does not engage in zoning activities, and Congress's preemption of certain aspects of local zoning decisions does not render the FCC a zoning administrator. There is no conflict between the decision under review and that of the Ninth Circuit.[14]

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[14] Petitioner CPT also raises (Pet. 24-25) a number of procedural complaints about the FCC's alleged failure properly to address petitioner's Rehabilitation Act claims. Those complaints are effectively moot in light of the Second Circuit's decision on rehearing to address petitioner's arguments on the merits and its ruling on

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2000

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the merits that the FCC's orders in this case did not violate the Rehabilitation Act. See Pet. App. A25.

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No. 00-417

In The

Supreme Court of the United States

MICHAEL C. WORSHAM,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER IN SUPPORT OF A WRIT OF CERTIORARI

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December 20, 2000

15 pp

QUESTION PRESENTED

In the Telecommunications Act of 1996, Section 704 preempted State and local control over wireless facilities cellular phone towers on the basis of the "environmental effects" of radio frequency emissions that comply with the Federal Communications Commission regulations concerning such emissions. Sections 601(c) expressly prohibited implied preemption. Section 253(b) preserves certain state regulation authority over public safety and welfare even if such regulation may create barriers to entry of telecommunications services.

1. Whether the Federal Communications Commission may imply preemption of local control and regulation over the "health effects" of radiation from wireless facilities, when the Telecommunications Act of 1996 expressly prohibits implied preemption, and only preempts local control over the undefined term "environmental effects."

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REPLY TO RESPONDENT AND REASONS FOR GRANTING THE WRIT

The *amici curiae* briefs filed in this case emphasize the significant importance of the health preemption issue raised by Petitioner. These briefs express the tremendous concern by Americans across the country over the health effects from wireless radiation, and loss of local control over health issues, and that these concerns are often the prime reason for citizen objection to cellular tower sites. See *amici curiae* briefs of U.S. Senator Patrick J. Leahy et al. at 5-6, the Concord Citizens for Responsible Tower Siting et al. at 5-20, Town of Lincoln, Massachusetts and the Lincoln Planning Board at 4-5, and Town of Islip et al. at 3-4. The FCC did not attempt to deny this concern.

These citizens' understandable concern is heightened when the health threat is from invisible radiation they cannnot control. Citizens' ability to control a threat to public health should not be taken away from those most entrusted and responsive to public health concerns – local officials, boards and agencies – without a clear manifestation of Congressional intent to do so, and unless carried out by an agency with the proper expertise. The 1996 Telecommunications Act ("Act") failed to provide adequate Congressional intent.

The development of a wireless infrastructure accelerated by the 1996 Act has increased public exposure to microwave radiation. Significantly, the radiation emitted from cellular towers is not the typical pollutant arising as an undesirable byproduct of an industrial manufacturing process. Rather, it is the commercial product itself, being sold to increasingly large numbers of Americans who buy

cellular phones, and more recently, wireless Internet computers. Secondly, microwave radiation also differs substantially from typical pollutants in that it can penetrate through trees, cars, buildings and into almost every nook and cranny of the American landscape.

A third substantial difference between microwave radiation and typical pollutants is that as a consequence of the radiation being the product itself, wireless service providers have a strong financial incentive to increase, rather than decrease, the amount of radiation emitted. The FCC, which regulates this radiation, is not a health or environmental agency, a point the government concedes. Resp. Brief at 21-22. As a result, oversight of an industry financially motivated to distribute an invisible, highly penetrating, and harmful product is – under the FCC's interpretation of the Act Petitioner challenges – limited to a federal agency without expertise in public health and environmental matters. This situation could compromise public health, and requires Court review.

I. There Exists An Assumption Against Preemption In Areas Of Health

The lack of FCC expertise in health or environmental matters increases the importance of this case, and augments the general presumption against interpreting statutes to preempt state law concerning health and safety. *Mauer v. Hamilton*, 309 U.S. 598, 614 (1940). The FCC argues that the exception to the general presumption against health and safety preemption is present here because Congressional intent was "clearly indicated by

those considerations which are persuasive of statutory purpose." Resp. Brief at 11-12 (citing *Mauer* at 614).

The FCC finds clear Congressional intent in a single House Report discussing Section 704 of the Telecommunications Act, which made a reference to local interference with wireless systems for reasons that were "at times not supported by scientific *and medical evidence.*" Resp. Brief at 11, n. 6 (citing H.R. Rep. No. 204 at 95) (emphasis in Resp. Brief). However, this and other references to public health were completely removed by the Senate in the Joint House-Senate Conference Report, reprinted in the Brief of Respondent Bill Jenkins at 53-56.

In *Mauer* this Court also found "other cogent reasons" why the section of the statute at issue could not be given a broad interpretation and preemptive effect, one of these being a previous hesitancy by Congress to interfere with state highway regulation. 309 U.S. at 614. Similarly, the instant case raises other cogent reasons: the previous statutory distinction by Congress of the phrases "health effects" and "environmental effects" (see Petitioner's (Pet.) Brief at 13-14, and again, *infra*), and the FCC's admitted lack of expertise in health and environmental matters.

The FCC's response supports Petitioner's point that the directive in Section 704(b) regarding completion of the ET Docket was insufficient Congressional direction: "Section 704 was not the source of the FCC's authority to act in this case, but is instead simply a congressional requirement that the FCC timely resolve an ongoing rulemaking. Resp. Brief at 19-20. In other words, according to the FCC, Congress simply told the FCC to hurry up

an ongoing rulemaking. Being told by Congress to timely complete an ongoing NEPA process, in no way creates clear Congressional intent to preempt traditional local control over health and safety matters. To preempt health issues Congress must pass statutory language clearly evincing an intent to federally preempt health effects. What Congress did was pass a provision in Section 601(c) of the Act, which explicitly prohibits the type of implied preemption which the FCC would have this Court read into the statute. As Petitioner argued in his Brief, the FCC's position and the Court of Appeals' decision turns traditional preemption analysis on its head, and improperly puts the burden on the state or local entity to establish Congressional permission, rather than on the agency seeking preemption to establish clear Congressional preemption.

II. Contrasting Federal Court Decisions

The rationale of why the Court of Appeals included "health effects" within "environmental effects" is explained in contemporaneous Second Circuit opinion. Two of the three Second Circuit Court of Appeals judges deciding the case below, *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000), also decided *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2nd Cir. 2000), and wrote the opinions in those cases which were both issued in February 2000.

The opinion in *Cellular Phone Taskforce* equated health and environment, stating without discussion that: "In the Second Order that is at issue in this case, the FCC announced, inter alia, a rule that prohibited state and

local governments from regulating any personal wireless service facilities based upon perceived health risks posed by RF emissions as long as the facilities conformed to the FCC Guidelines regarding such emissions." *Cellular Phone Taskforce*, 205 F.3d at 88. In *Freeman*, the Second Circuit discussed the term "health and safety":

> This term is used in conjunction with the term "environmental effects," which is not defined in the statute but most likely refers to the already-existing requirement that the FCC prepare an Environmental Assessment in connection with the grant of a license. See 47 C.F.R. § 1.1307 (1998). The environmental effects specified by the regulations do not include RF interference, but rather focus on degradation of the natural environment, effects on historical landmarks, and the biological effects of RF radiation.

204 F.3d at 325. The FCC argues that the opinions in the two Second Circuit cases do not conflict, and that further review is unwarranted. In fact, these opinions from the Second Circuit highlight the difficulty in discerning Congressional intent from the undefined term "environmental effects." This Court should decide the issue because further review by the Second Circuit would be fruitless.

The FCC highlighted the words "biological effects of RF radiation" in the above cited passage. Resp. Brief at 12. Petitioner notes that the words are from a passage which was the Second Circuit's best guess at what the statutory words "environmental effects" meant. They are taken from a section of the Code of Federal Regulations, which as the FCC itself noted, are part of an already-

existing requirement to perform an Environmental Assessment (EA) pursuant to the National Environmental Policy Act (NEPA), which predated the preemptive language at issue from the 1996 Act. Neither an EA or Environmental Impact Statement (EIS) was done as part of the FCC's rulemaking being challenged. This Court should review whether Congressional preemption can be inferred from a pre-existing requirement for an agency to consider environmental impacts under NEPA when that agency has not even performed an EA or EIS.

The FCC did not address the case outside the Second Circuit that distinguished "health effects" from "environmental effects." Petitioner repeats the pertinent statement from *Iowa Wireless Services, L.P. v. City of Moline, Ill.*, 29 F.Supp.2d 915, 924 (C.D.Ill. 1998): While it is clear from the record that the City of Moline considered potential *health effects* of the tower, it is less clear that they considered *environmental effects*. *Id.* (emphasis in original). This discussion is clearly in contrast to the Second Circuit, and again shows how Federal Courts have struggled to define the term "environmental effects." That two other Federal Circuit Courts mentioned by Petitioner have also declined to delve into this issue, Pet. Brief at 12, suggests that this Court should determine what Congress preempted regarding local regulation of "environmental effects" of RF radiation.

III. Congress Has Distinguished Health Effects From Environmental Effects

The FCC brushes aside Congress's previous disjunctive use of the terms "environmental effects" and "health

effects" in environmental statutes as being "of no moment. Resp. Brief at 12. Petitioner again points out the sections of environmental statutes in which Congress has distinguished terms or phrases which include "health" or "health effects" from "environment" or "environmental effects." See 15 U.S.C. § 2602(6) and especially 42 U.S.C. §§ 7412(a)(7) and (b)(2).

It is well established that "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993) (citation omitted). Congress's own previous definitions in environmental statutes would be a logical source for such an ordinary definition of "environmental effects." The Clean Air Act defines the term "adverse environmental effect" to mean "any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas." 42 U.S.C. § 7412(a)(7). This definition does not refer to effects on humans. The FCC has not suggested another meaning of "environmental effects" that supports its position that this term includes "health effects."

IV. Nondelegation Doctrine

Assuming arguendo that there might be an interpretation of 47 U.S.C. § 332(c)(7)(B)(iv) to allow FCC preemption of "environmental effects," that interpretation would have to exclude "health effects." This is

because to do otherwise significantly strengthens Petitioner's argument that the Act unlawfully delegated authority to the FCC.

The nondelegation issue was raised below, and the Second Circuit dismissed this and other constitutional challenges out of hand. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96-96 (2d Cir. 2000) ("We have considered petitioners' remaining constitutional arguments and find them to be without merit."). Petitioner notes that the Solicitor General recently petitioned for certiorari, which this Court granted, on the nondelegation issue, despite the fact that the court of appeals relied "on a theory that the parties had not extensively briefed." See Respondent's Brief in *Browner v. American Trucking Ass'n, Inc., cert. granted*, ___ U.S. ___, 120 S.Ct. 3129, 147 L.Ed.2d 231 (2000), Supreme Court Docket No. 99-1257 at 15.

Petitioner pointed out that this Court has cited with admiration the principle regarding Congressional delegation of power that "If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 408 (1928) (citation omitted). The FCC's Opposition Brief ignored this important point.

The restriction of power to an agency with particular expertise is to avoid the problem of determining who is actually minding the public interest. This problem is illustrated by other Petitioners who question whether the FCC can monitor the rapidly developing field of radiofrequency health by relying on agencies, such as the Environmental Protection Agency (EPA), the agency

authorized to provide guidance to all Federal agencies in forming radiation standards. 42 U.S.C. § 2021(h). Since the FCC is not an agency devoted to health issues, and the EPA is the authorized agency for developing radiation standards, Congress's delegation to the FCC in the 1996 Act is unconstitutional.

This Court should hear this case to decide whether Congress can delegate rulemaking and preemptive authority to non-expert federal agencies based on general grants of authority and standards. The FCC states that its authority to act here does not arise from section 704 of the 1996 Act, but rather, that it "acted under its broad authority to regulate communications conveyed by the Communications Act of 1934," and "pursuant to 47 U.S.C. § 307(a), which accords the agency authority to grant licenses 'if public convenience, interest, or necessity will be served thereby.' " Resp. Brief at 20. However, the cases relied on by the FCC to support delegation under such broad grants of authority do not support FCC rulemaking authority in areas where it has no expertise.

National Broad. Co. v. United States, 319 U.S. 190 (1943) and *FCC v. Pottsville Broad. Co.*, 309 U.S. 134 (1940) are over half a century old, when, as the FCC itself recognized, the potential health effects of RF fields were unknown. Resp. Brief at 24, n. 13. *Pottsville* was about a permit to construct a broadcasting station, an area clearly within the FCC's authority. *National Broad. Co.* addressed regulations "in the public interest" which governed the grant of licenses to stations that are part of networks, again an area where the FCC has clear authority. These cases differ drastically from the instant case, where the

health standard and corresponding preemption are in the area in which FCC admits it has no expertise.

Thus, the FCC finds authority for itself in its 1934 enabling legislation, and the relatively concurrent cases of that time discussing the "public interest" in non-health contexts, to develop a national health standard in an area it admittedly has no expertise in and for which no further Congressional direction has been provided – other than to hurry up. This Court should hear this case both to curb further expansion of the FCC's power, and to signal to Congress the need for clear instructions to federal agencies expected to carry out important Congressional directives, especially preemption of health issues.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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